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No.

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In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND
CENTRAL WEST VIRGINIA ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND
MOUNTAIN STATE CARBON, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Brooke County, West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners in this case entered into a contract to supply respondents with coal. After petitioners invoked the contract's *force majeure* provision to justify failing to supply the required amounts, respondents sued, alleging breach of contract and fraud. The fraud theory was essentially that petitioners promised respondents that they would make every effort to keep respondents from running out of coal when, in fact, they had no intention of doing so. The jury found petitioners liable on both causes of action, awarding $119 million in compensatory damages and $100 million in punitive damages. The trial court upheld the judgment and tacked on $24 million in pre-judgment interest, calculated at the above-market statutory rate of 10%. The following question is presented:

Whether a $100 million punitive award—imposed upon defendants that have been afforded none of the safeguards of the criminal law—is constitutionally permissible merely because the trial court has labeled the defendants' conduct "reprehensible" and the punitive damages do not exceed the compensatory damages.

RULE 14.1(b) STATEMENT

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Massey Energy Company is a publicly-traded company. It has no parent corporation, and Fidelity Management & Research owns 10% or more of its stock.

Petitioner Central West Virginia Energy Company is an indirect, wholly-owned subsidiary of Massey Energy Company. No other publicly-traded company has any ownership interest in Central West Virginia Energy Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Central West Virginia Energy Company and Massey Energy Company respectfully petition for a writ of certiorari to review the judgment of the Circuit Court of Brooke County, West Virginia, in this case.

OPINIONS BELOW

The trial court's order rejecting defendants' argument that the punitive award in this case is unconstitutionally excessive (App., *infra*, 1a-14a) is unreported.

JURISDICTION

The judgment of the Circuit Court of Brooke County, West Virginia was entered on September 4, 2007. The order of the Supreme Court of West Virginia denying review was entered on May 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case presents a recurring issue that is of great importance to the fair administration of punitive damages. The trial court allowed plaintiffs to reframe a routine claim for breach of a commercial contract as "fraud," and thus to seek punitive damages. The result was "another stereotypical West Virginia tort litigation bonanza" (*Pocahontas Mining Co.* v.

OXY USA, Inc., 503 S.E.2d 258, 266 (W. Va. 1998) (McCuskey, J., dissenting))—a $100 million punitive award on top of $119 million in compensatory damages, plus $24 million in prejudgment interest (calculated at the above-market statutory rate of 10% per annum). The trial court upheld the nine-figure punitive award after dubbing the conduct "reprehensible"—without saying why it was bad enough to warrant such an enormous sanction—and observing that the ratio of punitive to compensatory damages was less than 1:1.

Review is warranted to provide needed guidance as to the proper application of this Court's excessiveness guideposts in cases involving high absolute amounts of punitive damages, but low ratios of punitive to compensatory damages. Too frequently, lower courts rubber-stamp such awards without regard to whether the gravity of the conduct warrants such massive punishment or whether an exaction of that magnitude is justified for deterrence purposes.

The present case is an ideal one in which to address this recurring problem. Although labeled "reprehensible" by the trial court, petitioners' conduct pales in comparison to the truly heinous conduct that ordinarily would be thought necessary to warrant a nine-digit punishment. Moreover, the trial court itself concluded that the compensatory damages alone exceeded the "profit" from petitioners' alleged misconduct. That observation is all the more true when the hefty award of prejudgment interest (which, at 10% per annum, undeniably contains a punitive element) is factored into the analysis. Accordingly, though the ratio of punitive to compensatory damages may be low, the breathtaking absolute amount of punitive damages in this case—which far exceeds

both the maximum fines that can be imposed for *criminal* violations and the civil penalties typically imposed by West Virginia's expert regulatory agencies—is entirely unnecessary to advance the goals of retribution and deterrence. The Court should grant review to make clear to lower courts that in such circumstances, perfunctorily labeling the conduct "reprehensible" and observing that the ratio of punitive to compensatory damages is low is not enough to justify an eight-, nine-, or ten-digit punitive award.

A. Factual Background

Petitioner Massey Energy Company operates coal mines in West Virginia and other states. Tr. 3314. Petitioner Central West Virginia Energy Company ("CWVEC") is an indirectly-held subsidiary of Massey that handles Massey's sales for West Virginia. Tr. 1262.[1] Respondent Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), the plaintiff in this action, is a major steel producer, with over $1 billion in annual revenue. Tr. 913. Through a joint venture called Mountain State Carbon, Wheeling Pitt operates a coking plant[2] in Follansbee, West Virginia. Tr. 935. Coking plants consume large amounts of coal. Tr. 936.

In 1993, Massey and Wheeling Pitt entered into a 10-year coal supply contract (later extended to 2010), under which Wheeling Pitt agreed to buy all of its "high volatile coking coal" from Massey, at a base price of $41.41 per ton, with annual adjustments tied

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[1] Petitioners will be referred to collectively as "Massey" except when the context requires specificity.

[2] A coking plant consists of "batteries" of massive ovens in which coal is turned into coke, which, in turn, is used in the production of steel. Tr. 936.

to changes in the Producer Price Index. Tr. 491, Pl. Ex. 1, Article VI. The contract contained a broad *force majeure* provision, which stated that Massey would not be liable for failures to deliver caused by,

> without limitation, acts of God, war, insurrection, riots, nuclear disaster, strikes, labor disputes, labor and material shortages, fires, explosions, floods, river freeze-ups, breakdowns or damage to mines, plants, equipment or facilities (including emergency outages of equipment or facilities or to make repairs to avoid breakdowns thereof of damage thereto), interruptions to transportation, railway car shortages, [or] barge shortages.

Pl. Ex. 1, Article XI. The contract remains in force today. Tr. 5230.

Wheeling Pitt's coking operations require coal with a specific chemical composition; accordingly, the contract includes detailed quality requirements. Tr. 1306, Pl. Ex. 1, Article III.1.2-1.4. Massey has satisfied these requirements by blending coals from different Massey mines. Tr. 702-03. To achieve the correct blend, the component coals have to arrive simultaneously at a barge terminal owned by a third party, where they are blended and then shipped to Wheeling Pitt. Tr. 702-03, 4494-95. Other steelmakers do not require the same blended, high-quality coal that Wheeling Pitt does. As a result, Massey can supply those customers with coal from a single mine. Tr. 1397-98.

In November 2003, after the Wheeling Pitt contract had been in place for a decade, Massey adopted a production budget for 2004. Tr. 3610-12. This budget was based on detailed production forecasts

for each mine and reflected input from more than 100 Massey employees over a six-month period. Tr. 3595.

After the 2004 budget was completed, China announced that it would no longer export coal. That development sharply limited the supply available to coal users in Asia, causing the price of metallurgical coal to rise substantially. Tr. 3619. In response to these conditions, Massey took steps to increase its coal production for 2004. Tr. 3611-12. It more than doubled capital expenditures, expanding production in certain mines and keeping open mines that it had planned to idle. Tr. 3621, 3623, 3734. Massey also identified coal sources that had been budgeted for sale to utility customers ("steam coal") that could also be suitable for purchase by steelmakers ("metallurgical coal"). Tr. 3621-22. In a further attempt to free up its own production for metallurgical customers, Massey purchased 900,000 tons of coal on the New York Mercantile Exchange, which it used to satisfy delivery obligations for steam coal. Tr. 3622-23.

Both sides agree that during 2004 Massey failed to meet Wheeling Pitt's coal requirements. Plaintiffs claimed that Massey's failure to deliver was the result of a plan to market metallurgical coal to new, mostly foreign, customers at market prices that far exceeded the contract price with Wheeling Pitt, then to issue false or trumped-up notices of *force majeure* to excuse non-delivery to Wheeling Pitt. Plaintiffs further contended that Massey executives failed to disclose their new sales and falsely promised that the shortages were temporary in order to convince Wheeling Pitt not to seek out new suppliers.

Plaintiffs admitted, however, that Massey did not affirmatively conceal these sales, which were

widely publicized in trade publications and Massey's 10-K. Pl. Ex. 398; Tr. 3437-38. Indeed, Wheeling Pitt's purchasing manager, Art Hartline, testified that he had read about Massey's sales to foreign customers and discussed them with a Massey sales director. Tr. 600-01.

Massey also introduced evidence that during 2004 it truly was hamstrung by events beyond its control. One chronic problem—confirmed by Wheeling Pitt's own employees and expert witness—was a nationwide railcar shortage. Tr. 1077-78. Specifically, as Massey's vice president for transportation testified, Massey did not receive as many railcars as it requested on the route from Massey's southern West Virginia mines to the Ohio River barge terminal where coal was blended and shipped for delivery to Wheeling Pitt. Tr. 4420, 4452-54.[3] Massey also suffered from industry-wide labor shortages, as competing mines opened up to take advantage of rising prices. Tr. 3570-71, 5018-19. In response, Massey announced wage increases and retention bonuses targeted at the categories of workers who were most needed. Tr. 3541-42, 3684-85. Meanwhile, severe weather and flooding on the Ohio River disrupted power supplies and barge traffic on several occasions in 2004 and 2005. Tr. 2328-30, 4649-50. During the same time period, as Wheeling Pitt's expert witness acknowledged, Massey also experienced problems in specific mines, including roof cave-ins, equipment breakdowns, methane explosions, and adverse geo-

[3] The shortage was exacerbated by CSX's decision to allocate more rail cars to profitable long-haul routes, such as the route between Massey's mines and the seaport at Newport News, and fewer cars to shorter, less-profitable routes, such as the line used to supply Wheeling Pitt. Tr. 5000.

logical conditions. Tr. 4196-4200, 4193-97. Other of Wheeling Pitt's coal suppliers were experiencing similar difficulties meeting their production obligations. Tr. 770 ("Bluestone had some—some terrible problems.").

CWVEC (the Massey subsidiary that was party to the Wheeling Pitt contract) sent Wheeling Pitt a total of 30 *force majeure* notices between the end of 2003 and February 2006. Pl. Exs. 165A-C. Though plaintiffs contended that the volume of notices was the result of Massey's sales strategy and further contended that certain events either were foreseeable or were at least partly within Massey's control, their own witnesses admitted that many of the specific events described in the *force majeure* letters (1) occurred and (2) affected coal production or delivery. Wheeling Pitt's former CEO testified, for example, that he "knew that there was hopper car shortages, flat car shortages, engine shortages. The whole country was strained with that infrastructure during that period of time because, you know, with the whole raw material thing." Tr. 1077. See also Tr. 717-20, 2327-29 (flooding), 2342-43, 2345, 2365, 2377 (roof cave-ins and other mining problems).

In addition to the formal *force majeure* notices, Massey employees communicated with Wheeling Pitt employees at various levels of seniority throughout this period about production and transportation problems and Massey's efforts to address them. Hartline discussed Wheeling Pitt's needs with Massey personnel, who responded that "[w]e'll see what we can do, we'll get you something." Tr. 570, 648 ("We'll work together and see what we can get you."). In June 2004, Blankenship discussed the delivery problems with his counterpart at Wheeling Pitt, CEO Jim

Bradley, who offered his views about how Massey could satisfy Wheeling Pitt's requirements. Bradley never suggested that the production and transportation problems were not real. Tr. 3626-28. Blankenship told Bradley that "he was going to try to do everything possible to make sure that we had coal, we would never run out of coal." Tr. 970. Indeed, as the trial court found, when Wheeling Pitt informed Massey that it would have to shut down unless it received more coal, Massey made extraordinary efforts to ensure that Wheeling Pitt received the needed coal. App., *infra*, 10a, ¶ 10.[4]

B. The Trial

In April 2005, frustrated by Massey's inability to deliver sufficient amounts of coal, Wheeling Pitt sued CWVEC for breach of contract. In May 2006, Wheeling Pitt amended its complaint to add a claim for misrepresentation and a demand for punitive damages. The amended complaint also added Massey as a defendant on the fraud claim.

The Amended Complaint alleged that

- when the market price of metallurgical coal rose, Massey issued "patently improper *force majeure* notices" and sold to foreign customers at higher prices, rather than to Wheeling Pitt (Am. Compl. ¶ 2)[5];

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[4] Bafflingly, the court characterized this act of good will as evidence of fraud, stating that it proved that Massey could get rail cars when it really wanted to. App., *infra*, 10a.

[5] The trial court granted summary judgment to defendants on this claim. See Order (May 18, 2007) at 6 ("this Court finds that Plaintiffs' claims for misrepresentation do not include Defendants' force majeure notices"). Inexplicably, however, the

- after the *force majeure* events began, Massey falsely assured Wheeling Pitt that it would "do better" and would "undertake efforts to enable [Massey] to fulfill its obligations under the" contract (Am. Compl. ¶¶ 92, 95, 96-98); and
- Massey failed to disclose that it was entering into contracts with new customers at higher prices than Wheeling Pitt was paying (Am. Compl. ¶ 93).

The jury found CWVEC liable for breach of contract and both defendants liable for fraud. Tr. 5563-66. It awarded $119 million in compensatory damages and also imposed $50 million in punitive damages against each defendant. Tr. 5583.

C. Post-Trial Review of the Punitive Award

Massey filed post-trial motions, arguing, *inter alia*, that it was improper under West Virginia law to impose punitive damages for what essentially was a breach-of-contract claim; that, in any event, the conduct alleged did not support punitive damages; and that the amount of punitive damages was excessive

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court later relied on the notices in upholding the punitive award. App., *infra*, at 11a-12a ("Defendants alleged that a non-existent railcar shortage was the reason that they could not supply Plaintiffs with the coal they were contracted to sell."). In filling out the verdict form for the breach-of-contract claim, the jury answered "no" to the question whether the incidents described in the *force majeure* notices "actually occurred and were the reasons for the shortages." Tr. 5563. It never found by clear and convincing evidence (as was required for the fraud claim), however, that any particular notice was fraudulent. Nor was such a finding necessary to its fraud verdict, which could have rested on representations made by Massey about its intentions to do all it could to supply Wheeling Pitt with as much coal as possible or failures to disclose the existence of new sales contracts.

under state and federal law. App., *infra*, 20a-31a. In support of its contention that the punitive damages were excessive, Massey introduced uncontradicted expert testimony that, accepting *arguendo* plaintiffs' fraud theory, the maximum "profit" to Massey from its allegedly tortious conduct was no more than $52 million. Ex. A to Defs.' Mot. to Review Punitive Damages Award (Sutphin Aff.). It accordingly argued that the compensatory damages and prejudgment interest were more than sufficient to punish and deter, making the $100 million in punitive exactions grossly excessive. Wheeling Pitt meanwhile moved to "affirm" the punitive award. The trial court denied Massey's motions and upheld the full amount of punitive damages. App., *infra*, 13a-14a, 16a.

The court identified three representations or omissions that it regarded as fraudulent: (1) "the fraudulent affirmative statement that [defendants] could not control the allocation of railcars"; (2) assurances that Massey "would do everything possible to supply the requisite coal"; and (3) the failure to "disclose that [defendants] had other international customers paying substantially higher prices for their coal." App., *infra*, 10a, 11a. The court found that Massey thereby "le[ft] Plaintiffs in an unfortunate position," increased "the length of time that Plaintiffs continued to suffer damages" and "the amount of their damages," and caused plaintiffs "to remain in the contract resulting in harm to Plaintiffs." *Id.* at 11a.

In upholding the $100 million punitive exaction, the court stated that "[t]he punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the

compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award" and that "Defendants' conduct is also found to be reprehensible." App., *infra*, at 11a. The court never explained why the conduct was "reprehensible" enough to warrant a nine-figure punishment. Nor did it provide any reason to think that a punitive award of this magnitude was necessary for punishment and deterrence. In fact, it found that the compensatory award alone exceeded Massey's "profit" from the alleged scheme. App, *infra*, 13a; July 30, 2007 Hrg. Tr. at 87-88.

Massey and CWVEC petitioned the West Virginia Supreme Court of Appeals for review, arguing, among other things, that the punitive awards were unconstitutionally excessive. Pet. for Appeal by CWVEC 63-84; Am. Pet. for Appeal of Massey Energy 54-74. The petitions were denied without comment. App., *infra*, at 17a-18a.

REASONS FOR GRANTING THE PETITION

Over the past decade and a half, this Court repeatedly has expressed concern about punitive damages awards that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). Although "runaway awards" may not be "mass produced" by American courts (*Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2624 (2008)), such awards are hardly rare—and they are often imposed arbitrarily, rather than being reserved for the rare cases in which an enormous penalty is needed to accomplish the State's legitimate interests in punishment and deterrence. *Id.* at 2625-26. Alarmed by the increasingly large exactions being imposed by juries and sustained by the lower courts, this Court

has found itself compelled to remind bench and bar that a $2 million punitive award is "tantamount to a severe criminal penalty" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996)) and to explain that such a substantial exaction "cannot be justified on the ground that it [is] necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal" (*id.* at 584). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003) ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

Unfortunately, lower courts often lose sight of the forest for the trees, eschewing the required case-specific determination of whether the absolute amount of punitive damages is necessary for punishment and deterrence in favor of rote application of the three excessiveness guideposts identified by this Court in *BMW*. This problem is manifested in three recurring misconceptions. The first is the treatment of reprehensibility as a binary rather than a relative and comparative concept, which leads courts to conclude that large punitive damages are appropriate whenever conduct can be labeled "reprehensible." The second is the belief that a quantitatively "reasonable" relationship between punitive and compensatory damages is a safe harbor that supplants the basic principle that a punitive award can be no "greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). And the third is that the fines meted out in the criminal process and by expert regulatory agencies are of no relevance except in the rare instances in which they are both large and directly applicable to the conduct at issue.

As a consequence, although civil trials lack the safeguards of criminal proceedings, and civil juries lack the expertise, investigative resources, time, and perspective of regulatory agencies, reviewing courts continue to stand idly by as punitive awards spiral upward. Indeed, the $100 million exaction in this case was only the third largest upheld by the courts of West Virginia in 2007.[6] And West Virginia is not the only State in which nine-digit punitive awards have become common. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. L. STUD. 1, 6–8 (Jan. 2004) (listing 63 punitive awards over $100 million between 1985 and 2003).

The imposition of awards of this magnitude raises serious due process concerns that are not alleviated by superficial application of the guideposts. Review is urgently needed to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence.

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[6] The largest ($270 million) is the subject of a petition for certiorari that is being filed by NiSource, Inc. and Chesapeake Energy contemporaneously with this one. The second largest, $196.5 million against DuPont, is the subject of a pending petition for review in the West Virginia Supreme Court. See Lawrence Messina, *Manchin seeks review of $400 million DuPont case*, CHARLESTON DAILY MAIL, July 2, 2008, available at http://www.dailymail.com/News/200807020321.

A. This Court Has Repeatedly Expressed Concerns About Large Punitive Awards And Identified Several Risks That Require Caution In The Imposition Of Punitive Damages.

This Court has long cautioned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994).[7] In recent years, the Court has either struck down or articulated doubts about large punitive awards on several occasions.

In *BMW*, the Court held that a $2 million punitive award was unconstitutionally excessive, explaining that "a lesser deterrent" would suffice to satisfy the State's interest in deterring misconduct. 517 U.S. at 584. Five years later, the Court expressed grave doubts about the sustainability of a $4.5 million punitive award, observing that the court of appeals' ruling upholding the exaction was based on "a series of questionable conclusions by the District Court" that "likely" could not be sustained on a "thorough, independent review" of the record. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). And just two years after that, the Court held a $145 million punitive award unconstitutionally excessive, stating that "a more modest punishment for this reprehensible [fraudulent] conduct could have satisfied the State's legitimate objectives, and the

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[7] That danger is all the more severe when, as here, an out-of-state business is sued by a local plaintiff. The trial in this case was held a few miles from the Wheeling Pitt coke plant. Plaintiffs' counsel made sure that the fact that Wheeling Pitt was a local employer was not lost on the jury. See, *e.g.*, Tr. 5469 (non-delivery of coal "put an entire community * * * who was dependent on that company, in jeopardy").

Utah courts should have gone no further." *State Farm*, 538 U.S. at 419-20. In all, the Court suggested that "a punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.

In these and other cases, the Court articulated a range of concerns about punitive damages.

First, although punitive damages "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417.

Second, civil juries are typically subject to few constraints, lack the expertise and perspective of regulators, and may harbor sympathies toward local plaintiffs (like Wheeling Pitt). This creates a severe risk that the jury will choose an amount of punitive damages that is "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585) and that dwarfs "the size of such awards in the 18th and 19th centuries," even after adjusting for inflation (*Philip Morris*, 127 S. Ct. at 1064).

Third, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose[,] * * * constitutes an arbitrary deprivation of property," and violates "'elementary notions of fairness.'" *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574); see also *Philip Morris*, 127 S. Ct. at 1062 (emphasizing the risk that a State's punitive damages system "may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and "threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's ca-

price") (internal quotation marks and ellipses omitted).

Fourth, if a punitive award is "sufficiently large," it may, in practical effect, "impose one State's (or one jury's) policy choice * * * upon neighboring States with different public policies." *Philip Morris*, 127 S. Ct. at 1062 (internal quotation marks omitted).

Because of these concerns, the Court "has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Philip Morris*, 127 S. Ct. at 1062. Most important for present purposes, the Court has held that the Due Process Clause prohibits the imposition of punitive damages in amounts that are excessive in relation to the State's interests in retribution and deterrence. More particularly, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.[8] And even when it is determined that *some* amount of punitive damages is necessary, the

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[8] As this Court has explained, "[p]unitive damages aside," "[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986); see also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

question remains "whether a lesser deterrent would have adequately" served the State's interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further"); cf. *Exxon Shipping*, 128 S. Ct. at 2633 (recognizing "need to protect against the possibility * * * of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

This required inquiry necessitates careful scrutiny of the absolute amount of the punitive damages. To assist the lower courts in conducting that scrutiny, this Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive damages to the harm to the plaintiff (typically measured by the compensatory damages); and (iii) the civil fines authorized or imposed for similar conduct. *BMW*, 517 U.S. at 574-85.

The first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." *BMW*, 517 U.S. at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?"; the conduct has to be egregious to warrant *any* punitive damages in the first place. Moreover, while necessary, it does not suffice to ask "How does this conduct compare to other punishable conduct?"[9] Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by

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[9] The court below did not do even this much.

the extraordinary wrongfulness of the defendant's behavior" (*id.* at 595 (Breyer, J., concurring)).

The second guidepost is designed to ferret out punitive awards that are so disproportionate to the harm caused by the misconduct as to render their reasonableness suspect. Of course, in many cases "the ratio [of punitive damages to harm] will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." *BMW*, 517 U.S. at 583 (emphasis added). But that in no way means that punitive awards that are comparatively small multiples of the compensatory damages are immune from invalidation. As this Court has emphasized, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. An award that is the same size as or lower than the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other costs incurred by the defendant as a result of its conduct already serve to punish and deter.

The third guidepost addresses three significant concerns. First, principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). Second, the magnitude of applicable civil penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and re-

sources of expert regulatory agencies. When exercising their sanctioning powers, regulatory agencies have the time, expertise, and resources to conduct a full and impartial investigation. They also have knowledge of the regulatory backdrop and of the spectrum of punishable conduct, which enables them to "assure the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted)). Consideration of the penalties provided by statute and, even more importantly, the expert agency's actual fining practice, is therefore essential in determining whether the punitive damages exceed the amount reasonably necessary to punish and deter. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

Used properly, the three guideposts are well suited to their assigned task of assisting courts in determining whether a punitive award is excessive in relation to the State's legitimate interests in retribution and deterrence. Regrettably, this case and others reflect that many lower courts have lost sight of this ultimate inquiry and accordingly need further guidance on the purpose and proper application of the guideposts.

B. The Lower Courts Have Lost Sight Of The Concerns Underlying This Court's Punitive Damages Cases.

The court below rubber-stamped a $100 million punitive exaction based on the bald statement that Massey's conduct was "reprehensible" and the fact

that the compensatory damages exceed the punitive damages. In so doing, it neglected to address the central inquiry: whether an exaction of this enormous magnitude is necessary to punish and deter. Had it focused on that inquiry, it would have been obliged to recognize that, in the scheme of things, misleading a sophisticated business about one's intentions to fulfill one's contractual duties ranks quite low in the array of punishable torts and pales in comparison with conduct that has resulted in far lower amounts of punitive damages. It also would have had to acknowledge that its finding that the compensatory damages far exceed the "profit" from Massey's conduct means that the compensatory damages alone largely, if not entirely, fulfill the deterrent objective. And it further would have had to recognize that the fact that the punitive award dwarfs the criminal fines that may be imposed in West Virginia for more egregious conduct and the civil penalties that expert West Virginia regulatory agencies typically impose is a further compelling indication that the punitive award serves no valid state interest and therefore is an arbitrary deprivation of property.

Moreover, the analytical errors committed by the court below are by no means aberrational. Courts throughout the country routinely make these kinds of errors in upholding ever-increasing amounts of punitive damages.

For example, many courts treat reprehensibility as an on-off switch: As long as the conduct can be labeled "reprehensible" (and what conduct satisfying the standards for punitive liability can't be?), these courts move on to the next guidepost without ever asking whether the *degree* of reprehensibility is suf-

ficient to warrant a penalty of the magnitude at issue.[10] The courts plainly need reminding that the entire point of the reprehensibility inquiry is to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)), an exercise that requires comparing the conduct at issue to other punishable conduct.

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[10] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-70 (N.D. Iowa 2006); *Jurinko* v. *Med. Protective Co.*, 2006 WL 785234, at *6-*7 (E.D. Pa. Mar. 29, 2006) (unpublished); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at*29-*31 (W.D. Pa. Jan. 3, 2006); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-61 (Ark. 2003); *Super. Fed. Bank* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006) (unpublished); *Century Sur. Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d 742, 747-48 (Ga. Ct. App. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006); *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1148-49 (La. Ct. App. 2005), vacated sub nom. *Exxon Mobil Corp.* v. *Grefer*, 127 S. Ct. 1371 (2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-04 (Tex. Ct. App.–Dallas 2005, pet. denied); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App.–Corpus Christi 2005, pet. granted); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-19 (Tex. Ct. App.–Corpus Christi 2003), rev'd per curiam on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-17 (Utah 2004).

Similarly, like the court below, numerous lower courts have treated a low ratio of punitive to compensatory damages as a safe harbor, upholding multi-million-dollar punitive awards without regard to the degree of reprehensibility of the conduct or the extent to which the compensatory damages and other costs borne by the defendant as a result of its conduct already serve the interests of retribution and deterrence.[11] By contrast, only a few courts have

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[11] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 234 F. App'x 331, 339 (6th Cir. 2007) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Haslip*); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Rhone-Poulenc*, 345 F.3d at 1372 (taking no account of the absolute amount of the punitive award ($15 million) and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000 because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle*, 332 F.3d at 1362 (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which

conducted the broader inquiry into whether and to what extent the compensatory damages and other costs borne by the defendant as a consequence of its conduct serve the State's interests in retribution and deterrence, rendering even a 1:1 ratio excessive.[12]

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the Supreme Court has found to be 'instructive'"); *Barber*, 149 S.W.3d at 348 (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Advocat*, 111 S.W.3d at 361 (allowing $21 million punitive award that was 4.2 times the remitted compensatory damages of $5 million, because a ratio of 4.2:1 is not "breathtaking"); *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court" and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418 (upholding $9,018,780.75 in punitive damages on remand—a 9:1 ratio—even though this Court suggested that the constitutional maximum was around $1 million).

[12] See, *e.g.*, *Chicago Title Ins. Corp.* v. *Magnuson*, 487 F.3d 985, 998–1001 (6th Cir. 2007) (barring punitive damages in retrial on claim for tortious interference with contract because plaintiff could not prove that "'the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence'") (quoting *State Farm*, 538 U.S. at 419), cert. denied, 128 S. Ct. 1125 (2008); *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys., Inc.*, 181 F.3d 446, 467-70 (3d Cir. 1999) (reducing $50 million punitive award for breach of contract and fraud to $1 million because "large compensatory damages [$48 million] have been awarded" and the harm was economic "and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety'"); *Pichler* v. *UNITE*, 457 F. Supp. 2d 524, 530-32 (E.D. Pa. 2006) (disallowing punitive damages against union for willful and reckless violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2724, because

Finally, most lower courts have failed to appreciate the relevance of the third guidepost. A punitive award that is tens of millions of dollars greater than the criminal fines that could be imposed for more serious conduct after a defendant has been provided with the full panoply of criminal-procedure safeguards is surely one that grossly exceeds the amount reasonably necessary to punish and deter. The same is true of a punitive award that far exceeds the range of civil penalties typically imposed by regulatory agencies after conducting thorough and expert investigations. Yet the overwhelming majority of courts have disregarded the third guidepost precisely because the punitive damages are much larger than the fines doled out in the criminal and administrative forums or because the conduct at issue isn't serious enough to be subject to criminal or administrative sanctions.[13]

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statutory damages of over $4 million and other fees and costs would provide "ampl[e]" punishment and deterrence "without imposing punitive damages"); *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (vacating $3 million punitive award for civil theft and conversion "in its entirety" because the plaintiff received $2 million in compensatory damages and the defendant's conduct did "not warrant the imposition of further sanctions to achieve punishment or deterrence"), aff'd, 419 F.3d 1208 (11th Cir. 2005).

[13] See, *e.g.*, *ConAgra, Inc.* v. *Turner*, 776 So. 2d 792, 798 (Ala. 2000) (per curiam) ("[T]he parties agree that the legislature has created no criminal sanctions or penalties that apply to the retaliatory discharge of an employee. Therefore, this factor does not apply in mitigation of the punitive damages award.") (adopting lower court opinion); *BMW of N. Am., Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997) ("Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award * * *."); *Aken* v. *Plains Elec. Generation &*

C. The Present Case Is An Ideal Vehicle For Addressing This Recurring Misunderstanding Of The Excessiveness Inquiry.

The present case is an ideal vehicle for providing the lower courts with needed guidance about the proper excessiveness inquiry.

Transmission Co-op., 49 P.3d 662, 672 (N.M. 2002) ("As the Supreme Court of Alabama noted in *BMW* on remand, when statutory penalties for the conduct in question are low or do not exist, 'a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.'") (quoting *BMW*, 701 So. 2d at 514); *Santos* v. *STS Enters., Inc.*, 2005 WL 3776321, at *7 (N. Mar. I. 2005) ("We need not focus on guidepost three because there are no applicable civil penalties with which to compare the punitive damages awards."); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (legislative penalties have little relevance when they "are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award") (internal quotation marks omitted); *Schwigel* v. *Kohlmann*, 694 N.W.2d 467, 475 (Wisc. Ct. App. 2005) (ignoring third guidepost because "the conduct exhibited here could scarcely have been contemplated by the legislature when it enacted these statutes") (internal quotation marks and alterations omitted); *Boyd* v. *Goffoli*, 608 S.E.2d 169, 184 (W. Va. 2004) (it is "[a]pparent * * * that the Supreme Court did not believe that a punitive damages award one hundred times greater than the civil penalty that could be imposed for such conduct was excessive"); *Campbell*, 98 P.3d at 419 (holding that a punitive award that is 900 times the applicable maximum fine is "in line with the third *Gore* guidepost"); *Sherman* v. *Kasotakis*, 314 F. Supp. 2d 843, 875-76 (N.D. Iowa 2004) ("[I]n this case, there are no comparable civil penalties—which is precisely the reason that the federal government implemented statutes that would protect an individual's civil rights. For this very reason, some courts have found the third guidepost of limited utility in assessing the reasonableness of a punitive damages award for a civil rights violation.").

The misconduct alleged in this case—false reassurances made by one sophisticated merchant to another relating to a commercial contract, misstatements of the effect that *force majeure* events—most of which were conceded to have occurred—had on the defendants' ability to perform under that contract, and non-disclosures of transactions with third parties that were a matter of public record and that the parties in fact discussed—falls at the very low end of the reprehensibility scale. Indeed, it is highly questionable that Massey's conduct can even be characterized as tortious: Prior to this case, recognizing the strong incentive for plaintiffs to shoehorn their contract claims into tort theories in order to recover punitive damages, the West Virginia courts had consistently barred tort claims arising out of contractual relationships.[14]

Moreover, whether or not West Virginia ever before had treated conduct like this as tortious, there can be no serious doubt that Massey acted without malice and that, however denominated, its conduct

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[14] See, *e.g.*, *Cochran* v. *Appalachian Power Co.*, 246 S.E.2d 624, 628 (W. Va. 1978) ("If the plaintiff states a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort * * *."); *Lockhart* v. *Airco Heating & Cooling, Inc.*, 567 S.E.2d 619, 624 (W. Va. 2002) ("Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation."); *CWS Trucking, Inc.* v. *Welltech E., Inc.*, 2005 WL 2237788, at *2–*3 (N.D. W. Va. Sept. 14, 2005) (dismissing tort claim that was "dependent on the contract" because "West Virginia falls within the group of jurisdictions that will not allow both contract and tort claims arising from contractual circumstances").

pales in comparison to the acts of murder and torture at issue in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); the "true threats" of murder and mayhem involved in *Planned Parenthood* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005); the violent batteries committed in *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 757 (7th Cir. 2005) ("discharg[ing] a canister of pepper spray into the face of a fully restrained, incapacitated individual" and "throw[ing] [the] man's head against concrete," resulting in death) and *DiSorbo* v. *Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) ("violently slamm[ing] [prisoner] against the wall, chok[ing] her to the point where she began to lose vision, push[ing] her to the ground, and [striking] her while she was on the ground"); the deliberate acts of insurance bad faith targeted at vulnerable senior citizens at issue in *State Farm*; or even the business tort involved in *Eden Electrical, Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004), which was motivated by an intent to "f* * *" and "kill" the plaintiff financially (*id.* at 829). Yet with the exception of *Hilao*, a class action brought on behalf of thousands of victims, the punitive award here dwarfs the exactions in these cases of undeniably more egregious conduct.

Moreover, the undisputed evidence in this case was that the "profit" from Massey's alleged conduct could not have exceeded $52 million. See pages 10-11, *supra*. That caused the trial court to acknowledge that the $119 million compensatory award alone equaled or exceeded the profits from the misconduct. App, *infra*, 13a. Moreover, the trial court awarded $24 million in prejudgment interest, which was calculated at the above-market rate of 10% per annum. When prejudgment interest is pegged materially above the market rate, the portion that exceeds

the market rate has both punitive and deterrent effects.

Finally, the $100 million exaction far exceeds the criminal fines for conduct that is undeniably more serious. For example, the maximum fine for bank fraud is $10,000. W. VA. CODE § 31A-8-9; see also, *e.g.*, *id.* § 32A-1-2 (false advertising: $2,000); *id.* § 46A-5-103 (willful violations of consumer protection act: $5,000 fine (adjusted for inflation)); *id.* § 61-3-24 (larceny: $2,500). Similarly, although commercial contracts are not supervised by any administrative agencies in West Virginia, if Massey had violated mine safety rules or engaged in environmental violations, the penalty likely would have been tens of millions of dollars lower than the punitive award in this case. See *Taylor* v. *Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 200, 201 n.10 (W. Va. 2003) (discussing $100,000 fine against public sewage authority for discharging raw sewage into a waterway); *In re T & T Fuels, Inc.*, 2001 WL 34348825, at *1 (N.D. W. Va. 2001) (discussing $6.7 million fine for "a large breakout of acid-laden [mine drainage] water [that] began to discharge directly into the waters of West Virginia"), aff'd per curiam, 55 F. App'x 121 (4th Cir. 2003); Bloomberg, *Mine Where Explosion Occurred Was Cited for Hazards (Update3)*, Jan. 4, 2006 ("Mines can face a maximum [federal] fine of $60,000 or can be closed down if serious violations are found."; describing 208 citations, ranging from $60 to $440, to operator of Sago, West Virginia mine, where 12 miners died in accident).

In short, if the three guideposts had been applied with a view toward determining whether $100 million exceeds the amount necessary to deter and punish, there can be no question that the outcome in this

case would have been dramatically different. The case therefore is a good one for demonstrating the proper analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX

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APPENDIX A
[Opinion of the Circuit Court of Brooke County, West Virginia (Aug. 2, 2007)]

IN THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

ORDER

This matter came before the Court on the 30th day of July 2007 for hearing on Motions filed by the parties subsequent to the jury trial in this matter. The Court heard argument from counsel on Defendant, Central West Virginia Energy Company's Motion for Judgment as a Matter of Law as to the Claims asserted in its First Supplement to Counterclaim against Plaintiff, Mountain State Carbon, LLC. The Court heard argument from counsel, as well as testimony of Plaintiffs' witness, on Plaintiffs' Motion to include Pre-Judgment Interest. Finally, the Court heard oral argument on Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages. The Court has reviewed the Motions, the Responses thereto, and the memoranda of law; considered all papers of record;

heard the arguments of counsel; and reviewed all pertinent legal authorities.

Plaintiffs appeared by counsel, David B. Fawcett, Esquire and Gregory J. Krock, Esquire of Buchanan, Ingersoll & Rooney, P.C., and David F. Cross, Esquire of Cross Law Offices; Defendant, Central West Virginia Energy Company, appeared by counsel James A. Walls, Esquire and Matthew P. Heiskell, Esquire of Spilman Thomas & Battle, PLLC; Defendant, Massey Energy Company, appeared by counsel W. Henry Jernigan, Jr., Esquire, of Dinsmore & Shohl, LLP.

[2] Counterclaim of Defendant, Central West Virginia Energy Company

Defendant, Central West Virginia Energy Company, previously moved this Court for leave to file a Supplemental Counterclaim which leave was granted by the Court. The Court orally ruled that such counterclaim was strictly an issue of law that would be determined by the Court at the conclusion of the trial. The Court received no response from Plaintiffs to the Counterclaim. After the trial, Defendant moved for judgment as a matter of law. The Court received Plaintiffs' response to Defendant's Motion at the hearing.

Defendant argues that Plaintiff, Mountain State Carbon, did not pay the contractually agreed upon price for coal shipments made in November 2006 and December 2006. It is the position of Defendant that the contract amount per ton of coal changed effective November 1 of 2006 pursuant to the written agreement between the parties establishing the contractual year to be November 1 through October 31. Plaintiffs requested an opportunity to respond

arguing that the parties established a course of conduct that altered the contractual year to a calendar year.

After reviewing the Motion of Defendant, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The issues raised by Defendant's Counterclaim are strictly legal issues.

2) In order to determine the legal issues raised by the Counterclaim, the contract between the parties must be interpreted.

3) "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 1, *Stephens v. Bartlett*, 118 W.Va. 421, 191 S.E.2d 550 (1937). [3]

4) "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

5) The Coal Supply Agreement entered into between the parties is not ambiguous; therefore, the Court cannot look outside of the contract in making its determination regarding Defendant's Counterclaim.

6) In making its determination with regard to Defendant's Counterclaim, the Court did not consider any affidavits or trial testimony, but, rather, based its determination on the actual language of the contract between the parties.

7) The Coal Supply Agreement clearly defines the contract year to be November 1 through October 31; therefore, any modification to the price of coal made pursuant to the agreement between the parties would become effective November 1st of each contract year.

8) Defendant, Central West Virginia Energy Company, shipped to Plaintiff, Mountain State Carbon, 122,287 tons of coal in November and December 2006.

9) The price of coal increased by $34.65 per ton effective November 1, 2006.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company's Counterclaim against Mountain State Carbon is GRANTED; therefore, Defendant, Central West Virginia Energy Company, is entitled to an offset of the verdict rendered against it in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74; therefore, judgment is entered for Defendant, Central West Virginia Energy Company, on its counterclaim in the amount of $4,499,840.58.

[4] Prejudgment Interest

Plaintiffs moved the Court to include prejudgment interest at the rate of 10% on the jury verdict. Defendants argued that a recent statutory

change in West Virginia lowered the interest rate to 9.75% of a portion, if not all, of the jury's award.

After reviewing the Motion of Plaintiffs; considering all papers of record; hearing the testimony of Plaintiffs' witness and the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The West Virginia Legislature amended the statutory interest rate in June 2006 by amending *W. Va. Code § 56-6-31.*

2) Pursuant to this Amendment, the Supreme Court of Appeals of West Virginia entered an Administrative Order on the 2nd day of January 2007 establishing the rate of interest for the year 2007 to be 9.75% as determined by applying the standards set forth in *W. Va Code § 56-6-31.*

3) For all applicable time periods prior to 2007, the statutory rate of interest was 10%.

4) Plaintiffs argue that their judgment falls within an exception set forth in *W. Va Code § 56-6-31*, because the damages fell within the definition of special damages excluding it from the requirements of applying the lesser interest rate.

5) If an award falls within this exception, the applicable rate of interest is the interest rate from the year in which the right to bring the action accrued.

6) Plaintiffs' jury award does, in fact, fall within the statutory exception; therefore, Plaintiffs are entitled to receive pre-judgment interest in the

amount of interest from the year in which the right to bring the action accrued; that being 10%.

7) Plaintiffs offered the testimony of their financial expert along with a report that he prepared calculating the amount of pre-judgment interest. [5]

8) Plaintiffs' expert testified that pre-judgment interest on the jury's verdict at the rate of 10% would be Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669)

9) Plaintiffs' expert testified as an expert in his field that his basis for calculation was reasonable and acceptable in his profession.

10) Defendants did not produce any rebuttal evidence, but argued that and Plaintiffs' expert did not properly calculate the interest because he used the wrong dates when making his calculations.

The Court finds that the evidence produced by Plaintiffs was the best information available to the Court.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to include Pre-Judgment Interest at the rate of 10% in the amount of Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669) is GRANTED.

Punitive Damages Award

Plaintiffs' moved the Court to affirm the Jury's Award of Punitive Damages because the conduct of Defendants was reprehensible when they made fraudulent misrepresentations to induce Plaintiffs to remain in the contract knowing that they would not

supply Plaintiffs with the requisite coal in order to sell the coal to other customers at a higher price.

Defendants argue that their actions were not reprehensible, that the jury's verdict was clearly an award for breach of contract damages as opposed to a tort claim, and that such an award could lead to other claims that would be detrimental to their companies. Defendants assert that the only way the jury could have found fraud was to conclude that Defendants had an obligation to disclose to Plaintiffs their sales to other customers, which Defendants assert that no such duty existed.

[6] After reviewing the Motion of Plaintiffs, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) "Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

2) "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation

only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

[7] Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

3) "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syl. Pt. 4, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

4) Most, if not all, of the *force majeure* notices that this Court held valid on their face alleged that Defendants could not supply the requisite coal to Plaintiffs due to a railcar shortage.

5) The jury verdict form contained a specific question regarding the underlying incidents set forth in the *force majeure* notices.

6) The jury did not find that the underlying incidents set forth in the *force majeure* notices actually occurred and were the reasons for the coal shortages to Plaintiffs.

7) Based upon the jury's answers on the verdict form, it is clear the jury found the *force majeure* notices without a legal, factual basis. [8]

8) In order for the jury to find that the *force majeure* notices were without a legal, factual basis, the jury must have concluded that Defendants created the railcar shortage by requesting that the rail carrier send more of its cars for shipment to higher paying customers.

9) Defendants made the fraudulent affirmative statement that they could not control the allocation of railcars.

10) However, the Court found it very suggestive of Defendants' ability to control the allocation of railroad cars when Plaintiff, Wheeling Pittsburgh Steel Corporation, advised Defendants it would have to shut down because they could not receive barge shipments, Defendants were able to immediately ship coal by railcars all of the way to Follansbee.

11) Moreover, it was in Defendants' best interest to keep Plaintiffs in the contract. If Defendants were found guilty of a breach and Plaintiffs were permitted to purchase coal from other suppliers, Defendants would have been forced to pay the difference in price over the life of the contract between Plaintiffs and Defendants.

12) The Defendants are sophisticated, knowledgeable companies that knew what they were doing when they manipulated and/or caused the railcar shortages.

13) The conduct of Defendants, assuring Plaintiffs that they would do everything possible to supply the requisite coal, persisted for over two years leaving Plaintiffs in an unfortunate position.

14) Defendants attempts' to conceal their fraudulent conduct continued for that period.

15) In their attempts to conceal, Defendants blamed CSX Transportation, their railcar carrier.

16) Because of Defendants' conduct, the length of time that Plaintiffs continued to suffer damages lengthened and the amount of their damages increased.

17) Because Defendants didn't disclose that they had other international customers paying substantially higher prices for their coal, Plaintiffs remained in the contract. [9] Subsequently, Plaintiffs were under pressure to remain in the contract resulting in harm to Plaintiffs.

18) The punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award.

19) Defendants' conduct is also found to be reprehensible.

20) Defendants alleged that a nonexistent railcar shortage was the reason that they could not

supply Plaintiffs with the coal they were contracted to sell.

21) Defendants did everything they could to encourage Plaintiffs to remain in the contract in order to sell enough coal to Plaintiffs to discourage an action for breach which would have cost Defendants substantially more over the life of the contract.

22) These actions by Defendants went on in excess of two years.

23) The award in this case will not bankrupt Defendants.

24) The Court was only made aware of one other lawsuit filed based on similar acquisitions against Defendant, Massey Energy Company.

25) The Court is of the opinion that it should not reduce the amount of damages based on potential awards or claims in other cases.

26) It will be for any future Courts deciding similar claims to consider this action.

27) Based on the massive amount of discovery and the length of the trial in this matter, the costs expended by Plaintiffs in prosecuting this action must have been substantial.

28) Even with the punitive damage award, Plaintiffs may never be made whole.

29) Just because the amount of damages were the same for both the breach of contract claim and the tort claim, this Court cannot find that the jury was awarding damages for breach of contract only. [10]

30) In their verdict form, the jury clearly indicated that they found both Defendants to be guilty of fraud.

31) The Court is of the opinion that the jury did, in fact, award punitive damages as damages based on the fraud.

32) The Court is of the belief that the amount of damages in this case would be equal or close to the amount of profit Defendants derived from their fraud; however, after considering all of the other factors to be considered by the Court, the Court is of the opinion that the findings with regard to the other factors strongly support the verdict in this case.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages is GRANTED.

Jury Verdict

The trial of this matter commenced on the 30th day of May 2007 and concluded on the 2nd day of July 2007 upon the return of a unanimous jury verdict. Based upon such verdict and the rulings made herein:

It is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiffs, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, against Defendant, Central West Virginia Energy Company, in the amount of One Hundred Nineteen Million Eight Hundred Fifty Thousand Dollars ($119,850,000) plus prejudgment interest in the amount of Twenty-Four Million Fifty-Three Thousand, Six Hundred Sixty-Nine Dollars

($24,053,669). Defendant, Massey Energy Company, is jointly and severally liable for the judgment entered in favor of Plaintiff, Wheeling Pittsburgh Steel Corporation.

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Central West Virginia Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

[11] It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Massey Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company, is entitled to a set-off of the judgment against it in favor of Plaintiff, Mountain State Carbon, LLC, in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74.

The Clerk of the Circuit Court shall forward attested copies to all counsel of record.

ENTERED this 2nd day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

APPENDIX B
[Order of the Circuit Court of Brooke County, West Virginia (Aug. 31, 2007)]

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

ORDER

Currently before the Court are Defendants' Joint Motions and Memorandums of Law for: Judgment as a Matter of Law or, in the alternative, a New Trial with regard to the Tort Claims and Punitive Damages Award; a New Trial based upon Improper Admission of 404(b) Evidence; based upon Bias and Prejudice of the Jury; a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg.

This Court has reviewed the Defendants' Motions, the Memorandums of Law in Support, considered all papers of record, and reviewed all pertinent legal authorities. After careful consideration of Defendants' Motions for a New

Trial, this Court is of the opinion that these matters were previously considered by the court.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for Judgment as a Matter of Law or, in the alternative, for a New Trial with regard to the Tort Claims and Punitive Damages Award is **DENIED** without hearing.

[2] **WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Improper Admission of 404(b) Evidence is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Bias and Prejudice of the Jury is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg is **DENIED** without hearing.

The Clerk of the Circuit Court shall forward attested copies of this Order to all counsel of record.

ENTERED this 31st day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

APPENDIX C
[Order of the Supreme Court of Appeals of West Virginia (May 22, 2008)]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC, PLAINTIFFS BELOW,

Respondents

vs.)

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY, DEFENDANTS BELOW,

Petitioners

No. 080182

On a former day, to-wit, March 12, 2008, came the petitioner, Massey Energy Company, by W. Henry Jernigan, Jr., Timbera C. Wilcox, Ramonda C. Lyons and Nicholas S. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll &

Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior Status Judge Jolliffe sitting by temporary assignment.

APPENDIX D
[Excerpts from Defendants' Joint Motion and Memorandum for Post-Trial Review of Punitive Damages Award (July 31, 2007)]

IN THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL
CORPORATION and MOUNTAIN STATE
CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY
and MASSEY ENERGY COMPANY

Defendants.

Civil Action No. 05-C-85-MJG

DEFENDANTS' JOINT MOTION AND MEMORANDUM FOR POST-TRIAL REVIEW OF PUNITIVE DAMAGES AWARD

* * *

[16]

V. THE JURY'S AWARD OF PUNITIVE DAMAGES IS IMPROPER BECAUSE THE DEFENDANTS' CONDUCT LACKS THE REQUISITE REPREHENSIBILITY TO JUSTIFY SUCH AN AWARD AND ANY PROFIT RESULTING FROM DEFENDANTS' ALLEGED CONDUCT IS DISGORGED BY THE COMPENSATORY DAMAGE AWARD

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), the Supreme Court held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the *conduct* that will subject him to punishment, but also of the *severity* of the penalty that a State may impose."[23] As such, the Court developed three guideposts which serve to guide lower courts in their determination of whether a punitive damages judgment is excessive and thus unconstitutional. The guideposts are: (1) the degree of *reprehensibility* of defendant's conduct, (2) the *ratio* between the actual or potential harm, *i.e.* the compensatory damage award, and the punitive damage award, and (3) the *disparity* between the punitive award and the sanctions available for

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[23] *Williams*, 127 S.Ct. at 1062; *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. at 416, 418, 123 S.Ct at 1513. Most recently, the *Williams* Court discussed the significance of fair notice in this context, and Justice Breyer noted that a state must insist upon certain standards that will "cabin the jury's discretionary authority;" otherwise, a defendant will be deprived of the fair notice that all citizens enjoy. 127 S.Ct. at 1062.

comparable conduct.[24] Indeed, upon consideration of these three guideposts, the Court found that the punitive damages award in *Gore* was excessive.

A. THE DEFENDANTS' ALLEGED CONDUCT LACKS THE REQUISITE REPREHENSIBILITY TO JUSTIFY SUCH AN AWARD

[17] With regard to the first prong, which the Court has consistently deemed to be "the *most important* indicium of the reasonableness of a punitive damages award,"[25] the *Gore* Court advised states to consider the following in determining the reprehensibility of Defendant's conduct: (1) whether the harm caused was physical as opposed to economic; (2) whether the *tortious* conduct evinced an indifference to or a reckless disregard of the health and safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, rather than an accidental result.[26]

In reaching its decision that the punitive damages award was excessive, the *Gore* Court found none of the aggravating factors associated with reprehensible conduct to be present, for the harm which BMW inflicted on the Plaintiff was purely economic in nature. Additionally, the refinishing of the car, prior to purchase, did not effect its

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[24] *Id.* at 575 (emphasis added).

[25] *Id.* (emphasis added).

[26] *Id* at 575-76.

performance or its safety features. [27] In the instant case, similarly, Plaintiffs allege no physical harm, but rather focus solely upon the economic impact of Defendants' conduct. Additionally, as in *Gore*, the Plaintiffs failed to prove that Defendants' conduct evinced an indifference to or a reckless disregard toward others. As such, there is no evidence suggesting that the defendant's conduct jeopardized the health and safety of the plaintiffs.

Of particular interest in the instant case, the Court expounded upon the notion of economic harm and the financial vulnerability prong, explaining that "some wrongs are more blameworthy than others."[28] Revealingly, the Court stated that although certain instances of [18] economic harm may be more reprehensible than others, *e.g.* if the target is in financial distress or is an individual, then a greater penalty may be awarded, those facts evidencing a particularly vulnerable plaintiff compared to the stronger financial standing of the defendant, does not necessitate a mandatory sanction in the form of punitive damages for said harm.[29] In the instant case, as in *Gore*, the fact that Plaintiff Wheeling Pitt's financial standing was allegedly unstable does not automatically result in defendants' conduct being so reprehensible as to validate such an excessive award.

Moreover, in *Campbell*, the Court expressed its well-founded concern over the ramifications likely to result if the plaintiff is permitted to present evidence

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[27] *Id.* at 576.

[28] *Id.* at 575. *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521.

[29] *Id.*

of a defendant's net worth.[30] Although punitive damages awards traditionally function to deter and punish, much like other, similar criminal sanctions, a given defendant is exposed to such financial punishment in a civil case without those protections which would automatically be guaranteed in a criminal proceeding. In point of fact, the Court raised the concern over granting juries such wide discretion in choosing dollar amounts for a punitive damages award and also allowing the plaintiff to present evidence of the defendant's net worth.[31] This wide discretion coupled with evidence of a wealthy defendant creates a dangerous environment which exposes large businesses to great risk.[32]

[19] In addition to calling attention to defendant's financial status, the *Campbell* Court also commented on juries rendering excessive punitive damage awards based upon the reputation of the defendant.[33] Specifically, the Court opined that a punitive damage award should punish the defendant for the harm caused to the plaintiff by its conduct,

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[30] *Campbell*, 538 U.S. at 417, 123 S.Ct. at 1520.

[31] *Id.*

[32] *Id.* Justice O'Connor clearly expressed her concern over excessive punitive damages awards. In her dissenting opinion, she stated:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S.Ct. 1032 (1991).

[33] *Campbell*, 538 U.S. at 423, 123 S.Ct. at 1523.

not the jury's judgment as to the defendant's character or business practices.[34] Throughout the trial, and nowhere more blatantly than in its closing, the plaintiffs placed undue emphasis on the financial standing of the defendant, and unabashedly compared the defendant's standing with the vulnerability of the plaintiffs financial standing.

- "And you know that Massey had the benefit of keeping its met mines running coal to supply Wheeling-Pitt over the years, and that Massey received not millions of dollars, or tens of millions of dollars from Wheeling-Pitt over the life of the contract. Remember, about 40 million dollars a year. And you know that this contract was so important to Wheeling-Pitt it was one of only two contracts it kept after it went into bankruptcy, and that Wheeling-Pitt agreed to pay CWVEC 100 percent – I'm sorry, 100 cents on the dollar. You know that Massey

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[34] *Id.* Additionally, the *Gore* Court went to great lengths to warn future litigants of the dangers associated with using defendant's status as "big business" to secure a larger damage award:

> The fact that BMW is a large corporation rather than an impecunious individual *does not diminish* its *entitlement* to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy *implicates the federal interest* in preventing individual States from imposing *undue burdens on interstate commerce*. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

517 U.S. at 585, 116 S.Ct. at 1604 (emphasis added).

knew that Wheeling-Pitt was totally – totally reliant on it for its coal, and that shorting Wheeling-Pitt could kill it, the whole company, and extinguish the flame." Trial Tr. Vol. 22, p.5406-5407.

- "Wheeling Pitt is about one of 40 companies that had – steel companies that had to file bankruptcy in recent years, and Wheeling-Pitt was one of two companies to emerge from bankruptcy." Trial Tr. Vol. 22, p. 5453.
- [20] "And when you deliberate on that, think not just about Massey's revenues how they grew and don't just think about how Massey enormously increased its profit margins by selling coal on the export market, and don't just think about how callously Massey treated Wheeling-Pitt, but think about this: Think about what it would take to deter Don Blankenship, a man who does a cost benefit decision on every major decision he makes in his life in running Massey. What would it take to make him to take care to treat customers with special care and not be tempted to cheat in the future. If you enter a judgment that's less than what Massey gained by its conduct, what do you think the cost-benefit analysis will show? Was is worth it to cheat? Now, punitives should not be awarded in every case. But here we have special circumstances. Massey knew that Wheeling-Pitt was in a precarious financial condition, having just emerged from bankruptcy. If Wheeling-Pitt hadn't taken action, we wouldn't be here today, there wouldn't be any coke plant at Follansbee.

> Massey knew it was not supplying anywhere close to Wheeling-Pitt's requirements, but Massey made a conscious decision, and not telling Wheeling-Pitt about it, to sell and ship all the met coal it could to foreign steel companies. This was a conscious decision to put an entire community, an entire company, who was dependent on that company, in jeopardy, . . ." Trial Tr. Vol. 22, p. 5467-5468.

Thus, the jury considered these highly inflammatory assertions and incorporated them into its calculation, resulting in an unreasonable and excessive punitive damage award.[35]

Plaintiffs also alleged that defendants' conduct was particularly reprehensible because of repeated nondisclosures as to the particular uses of the metallurgic coal, which was not transported to Plaintiffs. The Court in *Gore* found the plaintiff's similar reasoning in that case with regard to BMW's nondisclosure of its pre-sale, refinishing policy, to be unpersuasive.[36] Here, as in *Gore*, defendants owed plaintiffs no duty to disclose, and therefore, its failure to disclose, when defendants had no such

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[35] The *Williams* Court emphasized, *inter alia*, the importance of states taking measures to ensure that juries are not basing their punitive damage awards on passion or prejudice or harm to non-parties, but rather that they are asking the "right questions" in assessing the award amount. This notion of ensuring a jury's appropriate motives in awarding damages represents an addition to the traditional *Gore/Campbell* analysis. From this recent decision, the *Williams* Court suggests that the purpose of the award, *i.e.* the jury's basis for determining a particular dollar amount should be considered in evaluating the award's excessiveness. 127 S.Ct. at 1064.

[36] *Id.* at 576-77.

duty or believed in good faith that no duty to disclose [21] existed, is not an affirmative act of misconduct.[37] As such, the repeated omissions of the information are clearly less reprehensible than a deliberate and affirmative act.[38]

The fifth and final factor to be considered under the reprehensibility analysis is not an issue in this case. Plaintiffs failed to present evidence to suggest that defendants had acted with intentional malice, deceit, or trickery. Because defendants had the good faith belief that no duty of disclosure was owed to plaintiffs, then its failure to disclose cannot not now be argued as a deceitful or malicious act; there is simply no proof to make this assertion.

In *Campbell*, the Court plainly stated that "the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders *any* award suspect."[39] Because the instant case presents none of the factors which are typically understood under the *Gore*, *Campbell*, and *Williams* framework to be egregious and improper conduct, plaintiffs fail to assert sufficiently reprehensible evidence to justify punitive damages of $100,000,000.00.

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[37] *Id.* at 580.

[38] *Id.*

[39] *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521 (emphasis added).

B. ANY PROFIT RESULTING FROM DEFENDANTS' ALLEGED CONDUCT IS DISGORGED BY THE COMPENSATORY DAMAGE AWARD

In *Campbell*, 538 U.S. 408, 123 S.Ct 1513 (2003), the United States Supreme Court held:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

[22] *Id.*, 538 U.S. at 419, 123 S.Ct. at 1518. The West Virginia Supreme Court of Appeals has long recognized this constitutional limitation on punitive damages. Justice Benjamin, in a concurring opinion in *In re Tobacco Litigation*, 218 W.Va. 301, 624 S.E.2d 738 (2005), recognized that

> [T]his Court has said on many occasions that *[p]unitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant*; and, in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded as, taken together with the compensatory damages, will sufficiently punish the defendant.

Id. 218 W.Va. at 314, 624 S.E. 2d at 751 (Benjamin, J., concurring) (emphasis added) (citing Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918). *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895),

Fisher v. Fisher, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947).

In *Garnes*, the West Virginia Supreme Court of Appeals held that punishment and deterrence are accomplished when "punitive damages [ ] remove the profit and [are] in excess of the profit, so that the award discourages future bad acts by the defendant." *Id.*, 413 S.E.2d at 908-09. Therefore, if the compensatory damage award in the present case of $119,850,000.00 is sufficient to remove all profit that Massey and/or CWVEC gained by its alleged fraudulent scheme plus an additional amount to deter future similar conduct, then punitive damages are not appropriate as a matter of law. Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918). *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895), *Fisher v. Fisher*, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947).

Accordingly, defendants, post-trial and for the purposes of this Motion and Hearing, have undertaken an analysis of any alleged profit that they earned as a result of the alleged fraudulent scheme. *See* Exhibit A, Affidavit of James Sutphin. Defendants calculated the additional revenue allegedly generated by selling the amount of coal that Wheeling Pitt deemed it was [23] shorted over the years 2003 – 2006. *Id.* The most cogent comparison is "Version 1," where defendants calculated sales of coal from Wheeling Pitt's approved mine load outs (*i.e.* Bandmill, Goals, Liberty, etc.) at the highest available price that Massey received from its foreign customers. *Id.* According to that calculation, Massey earned a

maximum additional revenue of $42,193,395. *Id.* at ¶ 6(a).

Even if one moves to a less relevant comparison, such as "Version 3," where sales to any metallurgical customer (including those being shipped coal that did not meet the CSA's quality specifications), Massey earned a maximum additional revenue of $52,251,453. *Id.* at ¶ 6(c). Plaintiffs have been awarded $119,850,000.00 in compensatory damages and are likely to be awarded an additional $23,500,000 in pre-judgment interest, bringing the total compensatory award in this case to approximately $143,350,000. Clearly, then, the compensatory award wipes out any alleged "profit" that Massey achieved through its purported "overarching fraud."

Moreover, the compensatory award punishes Massey above and beyond any profit it made by approximately $91,098,547 to $101,156,605. Undoubtedly, the compensatory award sufficiently punishes Massey's conduct and deters future similar conduct. In light of the longstanding precedent in West Virginia that "[p]unitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant," the punitive damages award in this case should be stricken as a matter of law. *In re Tobacco Litigation*, 218 W.Va. at 314, 624 S.E. 2d at 751 (Benjamin, J., concurring) (emphasis added) (citing Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918), *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895), *Fisher v. Fisher*, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947). [24]

* * *

[25]

VII. OTHER CIVIL ACTIONS AGAINST DEFENDANTS BASED UPON THE SIMILAR ALLEGATIONS MITIGATE AGAINST THE JURY'S AWARD OF PUNITIVE DAMAGES

On July 12, 2007, a Writ of Summons was served upon Massey Metallurgical Coal by Shenango Inc. ("Shenango"). *See* Exhibit B. As the Court will recall Charlie Gress of Shenango testified in this matter as a witness for plaintiffs. Surely, Art Hartline will testify in Shenango's trial against the Defendants. In light of the excessive punitive damage award, it is not surprising that Shenango has now jumped on the bandwagon. Indeed, every customer of Massey who believes it was "shorted" during this period may follow Shenango's lead. As set forth in the Affidavit of Eric Tolbert, Vice President and Chief Financial Officer for Massey, the jury award, without interest or costs, represents nearly twice (170%) Massey's total cumulative net income for the past four years (2003-2006) and fifty (50%) percent of its liquid assets. The punitive damage award alone represents 77% of the four year adjusted income and 23% of the company's liquid assets. If each successive plaintiff secures a similar compensatory and punitive award, Massey and its affiliates will be not only be destroyed for the occurrence of events beyond its [26] control -- they will be financially destroyed. Punitive damages may punish. They may not destroy. *Gore* and *Campbell*, (supra.)

VIII. CONCLUSION

For the reasons set forth above, Defendants respectfully submit that the jury's award of punitive damages be stricken.

* * *

Supreme Court, U.S.
FILED
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Nos. 08–217 and 08–218

In The Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,
Respondents.

On Petitions For Writs Of Certiorari To The Supreme Court Of West Virginia (No. 08–217) And Circuit Court Of Brooke County, West Virginia (No. 08–218)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the extensive post–trial and appellate procedures followed by West Virginia's courts in reviewing the punitive damage awards in this case—which included a post–trial hearing and review of the evidence by the trial court, and then *de novo* review by the West Virginia Supreme Court of Appeals—satisfy the Due Process Clause?

2. Does the Due Process Clause require the recusal of an appellate court justice who, in accordance with the justice's right to comment on matters affecting the administration of justice, has criticized a corporation's political efforts to influence the appellate court?

3. Did a trial judge who conducted a *de novo* review of punitive damage awards that are each less than one–half of the compensatory award, and issued thirty–two (32) separate findings and conclusions explaining the grounds for upholding the punitive awards, violate the Due Process Clause by failing to provide meaningful review?

RULE 29.6 STATEMENT

Wheeling Pittsburgh Steel Corporation is now known as Severstal Wheeling, Inc. Severstal Wheeling, Inc. is a subsidiary of Severstal US Holdings, LLC, which is a subsidiary of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Severstal Wheeling, Inc.

Mountain State Carbon, LLC is a Delaware limited liability company. Its members are Severstal Wheeling, Inc. and SNA Carbon, LLC. Both members are indirect subsidiaries of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Mountain State Carbon, LLC.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Wheeling Pittsburgh Steel Corporation ("Wheeling Pitt") and Mountain State Carbon, LLC ("Mountain State") respectfully submit this brief in opposition to the petitions for writs of certiorari regarding the rulings of the Supreme Court of Appeals of West Virginia (No. 08–217) and the Circuit Court of Brooke County, West Virginia (No. 08–218).

COUNTER–STATEMENT OF THE CASE

Petitioners attack the constitutionality of punitive damage awards that (1) a properly–instructed jury imposed after a five–week trial; (2) the trial judge upheld after requiring extensive post–trial briefing and oral argument; and (3) the appellate court reviewed *de novo,* after receiving the entire trial record and petitioners' summary of the relevant evidence, and rejected further review by a vote of five to zero.[1] The principal premise underlying the arguments raised by petitioners and their *amici* is that the West Virginia courts provided little or no review of the punitive damage awards imposed by the jury. In reality, both the Trial Court and WV Supreme Court adequately reviewed the awards.

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[1] For ease of reference, the Circuit Court of Brooke County, West Virginia is identified herein as the "Trial Court" and the West Virginia Supreme Court of Appeals is identified as the "WV Supreme Court."

Indeed, following this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the WV Supreme Court delineated detailed and extensive procedures for reviewing punitive damage awards in West Virginia. These procedures include an independent post–trial review of the evidence by the trial judge under exacting standards and then a merits–based review by the WV Supreme Court during the petition phase of the appellate process. The Trial Court and WV Supreme Court followed these extensive procedures in this case.

Thus, this case does not involve the denial of judicial or appellate review, but instead petitioners' request for *more* or *different* review. Petitioners want the Trial Court to explain, even more than it has already explained in the 32 separate findings of fact and conclusions of law set forth in its opinion upholding the punitive damage awards, the bases for its conclusion that the awards were appropriate. Presumably, they want the WV Supreme Court to entertain oral argument and issue a detailed written opinion supporting the conclusion that it reached after a *de novo* review. In support of their argument, petitioners note that other states (except for Virginia) choose to provide judicial review of punitive damage awards in a manner that differs from West Virginia, and ask this Court to instruct West Virginia to change its judicial system to conform with those states' systems.

This Court's function, however, is not to determine which state's judicial system is preferable. Nor is it this Court's role to require unanimity among the states. As it has done in the past in

response to similar petitions attacking West Virginia's judicial system, this Court should once again refuse to second–guess the judicial procedures adopted by West Virginia and it should deny the petitions.

A. Wheeling Pitt's Fraud Claim

This case involves more than a routine breach of contract. Instead, the case involves an extensive fraudulent scheme that petitioners undertook over a period of several years with full knowledge that their misconduct might cause catastrophic harm to Wheeling Pitt's business.

In particular, the jury found that petitioners made a series of misrepresentations to create the illusion that "events beyond their control" caused delivery shortfalls of coal and resultant damage to Wheeling Pitt's coke plant, when in fact petitioners were opportunely choosing to sell their coal to other customers to take advantage of skyrocketing coal prices on the world market. This fraudulent scheme was designed to induce Wheeling Pitt to remain in its long–term supply contract with Central West Virginia Energy Company ("CWVEC"), an indirect subsidiary of Massey Energy Company ("Massey Energy"),[2] under which it paid CWVEC tens of millions of dollars per year. The contract required Wheeling Pitt to purchase more than one million tons of high volatile metallurgical coal per year, which often amounted to more than 10% of Massey's

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[2] Massey Energy and all of its direct and indirect subsidiaries are collectively identified herein as "Massey."

annual production. Thus, the scheme's dual purpose was to retain Wheeling Pitt as a long–term customer while maximizing Massey Energy's profits by diverting coal from Wheeling Pitt to higher–paying export customers.

B. Evidence of Fraud Introduced at Trial

When the worldwide price for metallurgical coal skyrocketed in late 2003 and early 2004, Massey Energy directed its subsidiaries to solicit and enter into new contracts with export customers at high prices. Tr. 3318, 3408. Massey was aware, however, that it could not produce and deliver enough coal to satisfy both these new contracts and existing contracts. Pl. Ex. 215A (internal Massey memo acknowledging that shipping to the new export customers could "run domestic customers out of coal"); Pl. Ex. 245. Massey nevertheless entered into the new contracts, prioritized shipments to its new high–priced customers, and received tens of millions of additional dollars for its coal. Tr. 4608–10; Pl. Ex. 519E.

CWVEC then drastically curtailed the required shipments to Wheeling Pitt. CWVEC failed to deliver nearly 500,000 tons to Wheeling Pitt in 2004 (approximately 42% of Wheeling Pitt's requirements that year). Pl. Ex. 490D. Massey was well aware that these delivery failures would cause grave injury to Wheeling Pitt in the form of increased costs of acquiring coal and physical harm to Wheeling Pitt's coke plant. Tr. 953–54. These damages were so extensive that they jeopardized Wheeling Pitt's very existence. *Id.* During the same

time period, Massey delivered more than 1 million tons of high volatile metallurgical coal to new export customers to whom it had not budgeted to sell a single ton of coal in 2004. Tr. 1396; Pl. Ex. 519E. Massey could have used this coal to honor CWVEC's contractual obligations to Wheeling Pitt, but instead chose to sell it to new customers at higher prices.

Petitioners made numerous fraudulent misrepresentations to Wheeling Pitt to prevent it from discovering their scheme and to keep it from terminating the contract, filing a lawsuit, or taking other remedial actions in response to CWVEC's delivery failures. First, petitioners falsely represented that Massey experienced unexpected and catastrophic labor, transportation, and mining problems in order to deceive Wheeling Pitt into believing that the delivery failures were both temporary and unavoidable. Massey issued 28 separate letters over a roughly two–year period purporting to declare force majeure as an excuse for CWVEC's delivery failures.[3] Pl. Ex. 165A–165C. Many of these representations were blatantly false. For example:

- Petitioners falsely represented that Massey experienced catastrophic railcar shortages in 2004 and 2005. In reality, Massey received

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[3] In contrast, CWVEC declared only one event of force majeure during the first 10 years that the contract was in effect. Tr. 614–42.

more railcars in 2004 and 2005 than the previous years.[4] Tr. 4616–19.

- Petitioners falsely represented that Massey experienced severe labor shortages. In reality, Massey employed more workers in 2004 than 2003, and then even more workers in 2005. Pl. Exs. 391, 398.

- Petitioners falsely represented that Massey experienced unforeseen mining conditions that decreased its production. In reality, Massey's own documents proved that the conditions either (1) were anticipated by Massey or (2) did not materially affect production. Tr. 2209–30.

Second, Petitioners falsely represented that diligent remedial efforts were being undertaken to enable CWVEC to deliver the required coal to Wheeling Pitt. But, contrary to petitioners' contention, Massey did not make capital expenditures or purchase coal in order to fulfill promises to Wheeling Pitt. For example, Massey did in fact invest millions of dollars and open a new mine that produced coal that almost perfectly matched Wheeling Pitt's specifications at the very

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[4] In fact, the president of the railroad company (CSX Transportation) sent a note to Massey stating that CSX had provided 10% *more* rail service to Massey, and was therefore not to blame for CWVEC's failure to deliver nearly 50% of Wheeling Pitt's coal. CSX further stated that it was Massey, and not CSX, that decided where to ship Massey's coal. Pl. Ex. 208.

time that CWVEC was delivering only a fraction of the required coal to Wheeling Pitt. However, the coal from this new mine—which Wheeling Pitt desperately needed—was *not* intended for Wheeling Pitt as Massey claimed. Instead, Massey entered into a new contract to ship the coal to a new customer at a price that was more than twice the amount that Wheeling Pitt was paying for its coal. Tr. 3680–86; Pl. Ex. 328. Petitioners' contention that Massey was increasing its purchases from third–party coal producers to supplement its own production in order to get coal to Wheeling Pitt was similarly false. Massey's coal purchases actually *decreased* during in 2004 and 2005. Tr. 2395–96.

Third, petitioners failed to disclose that—at the very same time that they were representing that Massey had suffered catastrophic problems, but was doing everything possible to remedy them and increase shipments to Wheeling Pitt—Massey was entering into still more contracts to sell hundreds of thousands of additional tons of high volatile metallurgical coal to new export customers. Tr. 976. The failure to disclose these substantial new commitments was also intended to maintain the false assurances that Wheeling Pitt would receive its required coal in the future. When Wheeling Pitt ultimately learned through industry periodicals that Massey was engaged in significant export sales, and inquired about them, Massey's metallurgical salesman falsely stated that the sales involved "steam" coal that would not meet Wheeling Pitt's specifications. *Id.* at 599–600.

Petitioners had a powerful financial motive to undertake this fraudulent scheme. The parties' contract contained a price re–opener provision that enabled CWVEC to adjust the price that it charged Wheeling Pitt in 2007. CWVEC would therefore be able to require Wheeling Pitt to pay the then–existing market price in 2007. *Id.* at 695–97. Petitioners' scheme was to ship as little coal as necessary to keep the contract with Wheeling Pitt alive until the price re–opener took effect, and take maximum advantage of the soaring coal prices in the meantime.

C. The Trial Court's Review of the Punitive Damage Awards

At the end of the five–week trial, the jury—in a series of special interrogatories—found by clear and convincing evidence that petitioners made fraudulent misrepresentations upon which Wheeling Pitt relied. Verdict Form, ¶¶ 7, 11. The jury determined that the misrepresentations caused Wheeling Pitt to incur $10.75 million in damage to one of its coke batteries, $45.1 million in increased costs of acquiring coal, and $64 million in increased costs associated with acquiring coke. *Id.* at ¶¶ 8, 12. In total, the jury awarded Wheeling Pitt compensatory damages in the amount of $119.5 million. Because the jury found petitioners' fraudulent scheme and misrepresentations to be malicious, wanton, and oppressive, it also imposed $50 million in punitive damages upon each petitioner. *Id.* at ¶¶ 9–10, 13–14. The punitive damage to compensatory ratio in this case is therefore approximately 0.4:1— less than ½ to one.

Shortly after the jury entered its verdict, Wheeling Pitt moved the Trial Court to uphold the punitive damage awards and enter judgment pursuant to the procedures that the WV Supreme Court established for post–trial review of punitive damage awards in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). Wheeling Pitt filed a brief summarizing the evidence and setting forth the bases for upholding the awards. In their 27–page opposition brief, petitioners argued that the awards were improper and excessive based on the evidence introduced at trial. Petitioners also attempted to submit new evidence, in the form of affidavits and spreadsheets, regarding the amount of profit that they received by defrauding Wheeling Pitt.

After conducting a lengthy hearing on the motion, the Trial Court upheld the punitive damage awards and entered judgment. In the portion of the Order addressing punitive damages, the Trial Court included 32 separately–numbered paragraphs setting forth its findings of fact and conclusions of law. Pet. App. 24a–31a. The Trial Court determined that petitioners sold coal to higher–paying customers, misrepresented that they did not control the routes of their railcars, used their available railcars to ship coal to the higher–paying customers, failed to disclose the new export sales, concealed their scheme, and did everything they could—over a two–year time period—to keep Wheeling Pitt in the contract and prevent it from exercising its rights. *Id.* at 28a–31a. The Trial Court concluded that this conduct was so reprehensible that it warranted the punitive damage awards. *Id.* The Trial Court further determined

that the punitive damage awards bear a reasonable relationship to the harm caused by petitioners, especially given that even the amount of the punitive damage awards *combined* is less than the amount of compensatory damages. *Id.* at 29a.

D. The West Virginia Supreme Court's *De Novo* Review

Petitioners filed their petitions for appeal with the WV Supreme Court in December 2007. After receiving leave to file amended petitions in excess of the 50–page limit, petitioners filed amended petitions in March 2008. CWVEC's amended petition contained 65 pages and Massey Energy's contained 75 pages. Petitioners devoted a significant portion of their amended petitions to challenging the punitive damage awards. On January 10, 2008—three months *before* petitioners filed their amended petitions, the Trial Court sent the entire trial record to the WV Supreme Court. *See* Respondents' Appendix (excerpt of docket from Trial Court evidencing submission of the record to the WV Supreme Court) at 1b–2b.[5]

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[5] Petitioners initially moved to recuse Justice Larry Starcher on December 10, 2007. Petitioners identified 11 statements that Justice Starcher made about Massey and/or its Chief Executive Officer, Don Blankenship, which they claimed to evidence his bias against Massey. Ten of those statements pertained to a specific topic—Massey's political involvement in attempts to elect candidates that it favors to the WV Supreme Court. Petitioners based their recusal motion exclusively on the ethical canons and laws of West Virginia. They did not cite to the United States Constitution, refer to federal due process,

After receiving the trial record, lengthy amended petitions, and respondents' opposition briefs, the WV Supreme Court conducted a *de novo* review of the punitive damage awards. *Boyd v. Goffoli*, 608 S.E.2d 169, 176 (W. Va. 2004) (the WV Supreme Court provides *de novo* review to punitive damage awards). The WV Supreme Court concluded that further review was unwarranted and, by order dated May 22, 2008, refused the amended petitions by a unanimous vote of five to zero.

REASONS FOR DENYING CERTIORARI

A. Certiorari Is Not Warranted Because Petitioners Failed to Preserve a Due Process Challenge to West Virginia's System of Appellate Review and Received All of the Process That They Were Due

This Court should deny review of petitioners' claim that the West Virginia courts failed to provide appellate review for three independent reasons. First, petitioners have waived the issue by failing to raise it with the WV Supreme Court. Second, it is well established that the Due Process Clause does not require appellate review in either civil or criminal cases. Third, the WV Supreme Court

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or rely upon federal law. Petitioners later filed three supplemental motions and/or submissions in which they renewed their request that Justice Starcher recuse himself. In none of these supplemental filings did petitioners cite to or otherwise rely upon federal law.

nevertheless conducted a *de novo* review of the punitive damage awards in this case.

1. Petitioners Have Not Preserved the Issue by Raising It With the WV Supreme Court

"It is well settled that this Court will not review a final judgment of a state court unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (internal quotation omitted). This Court has recognized an exception to the rule, however, where the highest state court renders an unexpected interpretation of state law. *Herndon v. Georgia*, 295 U.S. 441, 443–44 (1935),

In *Herndon*, this Court held that an interpretation cannot be "unexpected"—and must be challenged below—if the state court announced that same interpretation in the past. The petitioner in *Herndon* alleged that a statute criminalizing attempts to incite insurrection was unconstitutional because it did not require that "immediate serious violence against the State of Georgia was to be expected or advocated." *Id.* at 444. The petitioner had not raised this argument below, however. This Court rejected the petitioner's argument that the issue involved an unexpected interpretation of state law because the state court had recently ruled (in a dispute known as the "Carr Case") that proof of imminent violence was not a required element under the statute. *Id.* at 445–46. The Court explained that

the petitioner could not " plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in its own case, and preserve his right to review here by appropriate action upon the original hearing in the court below." *Id.* at 446.

Herdon is directly on point. It is undisputed that petitioners did not argue below that the United States Constitution *required* the WV Supreme Court to accept the appeal and provide further review. Nor can petitioners contend that the WV Supreme Court's decision was unexpected. The WV Supreme Court has consistently stated, for almost 20 years, that it reviews punitive damage awards at the petition for appeal stage and that further review is not necessarily required. *Garnes*, 413 S.E.2d at 910 ("After the trial court has examined and ruled on the punitive damages award, the losing party may petition for appeal to this Court. In our review of the petition, we will consider all of the same factors that we require the jury and trial judge to consider ..."); *Pote v. Jarrell*, 412 S.E.2d 770, 777 (W. Va. 1991) ("[M]erely because error relating to a punitive award is asserted in the petition, that appeal will not automatically be granted on the punitive damage point alone.").

Petitioners cannot plead ignorance of these authorities. If petitioners believed that the Due Process Clause required the WV Supreme Court to accept their appeal for further review, then they were required to raise the issue below and afford the WV Supreme Court the opportunity to rule upon it.

Petitioners' failure to do so precludes them from raising the issue in this Court.

2. Due Process Does Not Require Appellate Review of Punitive Damage Awards

Petitioners contend that "[t]his Court's decisions establish a due–process right to appellate review of punitive–damages awards." Petition for a Writ of Certiorari (No. 08–217) at 2. This contention is inaccurate. The Court has consistently proclaimed, for nearly a century, that the Due Process Clause does not require a state to provide appellate review of its trial court's rulings. *M.L.B. v. S.L.J.*, 519 U.S. 102, 114 (1996) (Due Process Clause does not require states to provide appellate review of orders terminating parental rights); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit Cty.*, 281 U.S. 74, 80 (1930).

This Court's decisions involving punitive damage awards do not alter its long–standing position that states are not required to provide appellate review. In *Haslip*, the Court held only that Alabama's appellate review of punitive damage awards provided "an additional check" on the jury's discretion. *Haslip*, 499 U.S. at 20. Several of the concurring justices wrote separately, however, to underscore that the Court was not requiring—and

cannot require—other states to adopt Alabama's system of imposing punitive damages. *Id.* at 24–25 (Scalia, J., concurring) (ruling is limited to the constitutionality of Alabama's particular procedures as applied, which "provides no guidance as to whether any *other* procedures" would be constitutional); *id.* at 42 (Kennedy, J., concurring) ("We do not have the authority ... to alter the rules of common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination.").

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that Oregon's statute which prohibited any judicial review of punitive damage awards, "without providing any substitute procedure" to safeguard against a jury's bias in imposing punitive damages, was unconstitutional. *Id.* at 432. The Court did not require Oregon to provide appellate review. *Id.* Rather, it recognized that Oregon could satisfy due process by providing "substitute" procedures. *Id.*

Nearly a decade later, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court granted certiorari to resolve a split in the circuits as to the proper standard of appellate review of punitive damage awards imposed by federal district courts. *Id.* at 426, 431. While the Court held that circuit courts must provide a *de novo* review of punitive damage awards imposed by district courts, its ruling was not premised on constitutional principles applicable to state courts. *Id.* at 436. Even if it were, however, such a ruling

would still not require states to afford defendants a right to appeal such awards. In fact, this Court has held that appellate courts must apply a *de novo* standard of review to several types of rulings in criminal cases. *See United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (requiring *de novo* review of whether a criminal fine is excessive under the Eighth Amendment); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (determinations of reasonable suspicion and probable cause must be reviewed *de novo* on appeal). Even after issuing these opinions, however, the Court reaffirmed that the Due Process Clause does not require states to provide any appellate review in criminal cases. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."). *Cooper* therefore leaves undisturbed the well-established principle that, even where punitive damages are awarded, civil litigants do not possess a constitutional right to appeal.

In short, this Court has unambiguously and repeatedly stated that the Due Process Clause does not require states to provide appellate review of trial court decisions. The Court has not held otherwise in its opinions addressing due process associated with the imposition of punitive damage awards. Petitioners' suggestion that the Court implicitly overturned nearly century-old pronouncements—by requiring that, if a federal appellate court reviews a punitive damage award, the review be *de novo*—is baseless.

3. In Any Event, the WV Supreme Court Provided a *De Novo* Review of the Punitive Damage Awards

Even if this Court were inclined to reconsider its decisions holding that civil litigants do not have a constitutional right to appeal, this case would not be an appropriate vehicle for doing so because the WV Supreme Court substantively reviewed the merits of the punitive damage awards when considering the petitioners' amended petitions. Like every other West Virginia defendant against whom punitive damages are awarded, petitioners were therefore afforded meaningful appellate review of those awards.

The WV Supreme Court has made it clear that, out of "concern that there be ... a meaningful adequate review" of punitive damage awards, it reviews punitive damage awards in the context of petitions for appeal. *Garnes*, 413 S.E.2d at 908–10. In *Garnes*, the WV Supreme Court expressly announced the procedure for appellate review of punitive damages in West Virginia. *Id.* A party challenging a punitive damage award must file a petition for appeal which (1) addresses with specificity each factor that the jury and trial court are permitted to consider and (2) summarizes the evidence presented to the jury or trial judge during the post–judgment review. *Id.* Petitioners must not simply advance policy or societal reasons for taking the appeal, but instead must specifically address the merits of the appeal (*i.e.*, whether punitive damages are proper and justified based on the trial evidence). *Id.*; *see also Alkire v. First Nat'l Bank of Parsons*,

475 S.E.2d 122, 130–31 (W. Va. 1996) ("*upon petition*, this Court will review the amount of the punitive damages award, applying the standard specified in ...*Garnes*") (emphasis added).

The WV Supreme Court revisited this standard in *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997). The WV Supreme Court concluded that the review process set forth in *Garnes* is consistent with this Court's guideposts in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and therefore should remain the proper standard for reviewing punitive damage awards. *Vandevender*, 490 S.E.2d at 692–93. The WV Supreme Court has also clarified that it applies a *de novo* review of the punitive damage award during the petition for appeal stage of the proceeding. *Boyd*, 608 S.E.2d at 176–77 ("As a preliminary matter, we note that our review of this issue is *de novo*.").

Petitioners are not the first litigants to challenge the constitutionality of West Virginia's system of appellate review. In other civil and criminal cases, defendants have asked courts—including this Court—to require West Virginia to modify its judicial system. In each instance, the courts refused to invalidate West Virginia's judicial system as unconstitutional.

For example, in *Billotti v. Legursky*, 975 F.2d 113, (4th Cir. 1992), a criminal defendant petitioned for a writ of habeas corpus in federal court when the WV Supreme Court refused his petition for appeal

challenging his murder conviction. *Id.* at 115.[6] The district court dismissed the petition and the Fourth Circuit affirmed, holding that West Virginia's judicial system did not violate the Due Process Clause. *Id.* at 115–16. The Fourth Circuit concluded that West Virginia afforded the defendant an adequate opportunity to challenge his conviction at the petition for appeal stage, and that—while West Virginia's judicial system differs from most other states' systems—it is not the federal court's role to determine which state's judicial system is "preferable." *Id.* at 116. The defendant petitioned for certiorari and this Court denied the petition. *See Billotti v. Legursky*, 507 U.S. 984 (1993).

This Court has also previously denied petitions for certiorari alleging that the WV Supreme Court should be required to grant petitions for appeal and provide further review of punitive damage awards. In *Mountain Enterprises, Inc. v. Fitch*, No. 03–1223, 2004 WL 367611 (U.S. Feb. 26, 2004), the petitioner urged this Court to grant review of a West Virginia punitive damages award and recognize a right to additional appellate review of such awards. *Id.* at *13. The Court denied the petition. *Mountain Enterprises, Inc. v. Fitch*, 541

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[6] In the underlying proceeding, the WV State Court rejected the contention that due process mandates that a defendant convicted of first–degree murder receive "full appellate review." *Billotti v. Dodrill*, 394 S.E.2d 32, 36–37 (W. Va. 1990). The WV Supreme Court concluded that its review of the petition for appeal constitutes appellate review, so the defendant's contention that he received no appellate review—the very same contention that petitions raise in this case—was unfounded. *Id.* at 40.

U.S. 989 (2004). In *Camden–Clark Memorial Hospital Corp. v. Boggs*, No. 07–812, 2007 WL 4458908 (U.S. Dec. 18, 2007), the petitioner made the very same arguments that petitioners herein advance—that this Court has implicitly ruled that the Due Process Clause requires more than appellate review of punitive damage awards at the petition for appeal stage. *Id.* at 8–12, 17–19. This Court denied the petition for certiorari only months ago. *Camden–Clark Memorial Hosp. Corp. v. Boggs*, 128 S. Ct. 2080 (2008).[7]

The Court should similarly deny the petitions in this case. The WV Supreme Court has unambiguously pronounced, in *Garnes* and its progeny, that it provides *de novo* review of punitive damage awards at the petition stage—including a review of the facts, evidence, and arguments addressing each factor that the jury and trial judge were required to consider. Each petitioner in this case was granted leave to exceed the 50–page limit applicable to petitions for appeal, and submitted separate amended petitions that specifically

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[7] Unlike petitioners in this case, the petitioners in *Mountain Enterprises* and *Camden–Clark* preserved the issue for appeal by arguing to the WV Supreme Court, in conjunction with their petitions for appeal, that the Due Process Clause of the Fourteenth Amendment required the WV Supreme Court to allow their appeals and provide further review. *See Mountain Enterprises*, 2004 WL 367611, at *9 (petitioner filed a motion for reconsideration with the WV Supreme Court arguing that the Due Process Clause required it to grant the petition); *Camden–Clark*, 2007 WL 4458908, at *6 (petitioner argued in its petition to the WV Supreme Court that the Due Process Clause required the WV Supreme Court to grant the petition).

addressed the factors and evidence that the jury and Trial Court considered in imposing the punitive damage awards. The WV Supreme Court received the entire trial record several months before petitioners filed their amended petitions and, therefore, had all of the evidence that was presented to the Trial Court. After conducting its *de novo* review, the WV Supreme Court determined that further review was unnecessary and refused the amended petition. Under these circumstances, there is no doubt that petitioners had a fair opportunity to present their allegations of error to the WV Supreme Court.

The fact that the WV Supreme Court elected not to provide any further review in this case, or issue a written opinion explaining the results of its review of the amended petitions, simply does not amount to a deprivation of due process.[8] This Court's role is not to micromanage state court systems or otherwise require unanimity among the states. The fact that other courts provide appellate review in a manner that differs from West Virginia (and Virginia) is irrelevant. It is not this Court's function to evaluate which state's system is better, fairer, or wiser. This Court's only role to determine whether West Virginia's system comports with the Due Process Clause. The WV Supreme Court's *de*

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[8] It is well established that the Due Process Clause does not require that courts issue written opinions that set forth in detail the bases for their findings. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464–65 (1993); *Black v. Romano*, 471 U.S. 606, 613–14 (1985); *Harris v. Rivera*, 454 U.S. 339, 345 & n.11 (1981); *Arizona v. Washington*, 434 U.S. 497, 516–17 (1978).

novo review of the facts and evidence at the petition stage unquestionably satisfies due process. Condemning the WV Supreme Court simply because it may perform appellate review on a petition for appeal is inconsistent with the substantial leeway that states enjoy "to define ... rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008).

B. Certiorari is Not Warranted to Second Guess Justice Starcher's Decision Not to Recuse Himself Under the Unique Facts of this Case

This Court should also deny review of Justice Larry Starcher's decision not to recuse himself from this case. First, petitioners have waived the issue by failing to raise their federal due process challenge with the WV Supreme Court. Second, Justice Starcher's criticism of Massey's political involvement with the WV Supreme Court—and its attempt to influence the administration of justice—was entirely appropriate and did not demonstrate a bias against the company. Third, Justice Starcher did not acknowledge that his statements were evidence of bias, and his recusal in another case involving Massey (for other reasons) did not require his recusal in this case.

1. Petitioners Have Not Preserved a Constitutional Challenge to Justice Starcher's Refusal to Recuse

Congress has empowered this Court to review only those state court decisions involving rights that

are "specially set up or claimed" under the Constitution or statutes of the United States. 28 U.S.C. § 1257(a)(2007); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). The petitioner bears the burden of demonstrating to this Court that it presented the federal issue to the state court with fair precision. *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *Webb v. Webb*, 451 U.S. 493, 499 (1981).

This Court has repeatedly held that general references in state court pleadings to certain rights that are available under the United States Constitution, including references to "due process," are insufficient to properly present a federal claim. *Adams*, 520 U.S. at 88–89 & n.3 (passing references to "due process," which could have referred to rights under the federal or Alabama Constitution, did not clearly present a federal claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77–78 (1988) (general reference to punitive damage award as violating constitutional principles did not make it clear that petitioner was alleging a violation of the Due Process Clause of the Fourteenth Amendment); *Webb*, 451 U.S. at 496 (references to "full faith and credit," without citing to the Federal Constitution or to cases relying upon it, did not clearly assert a federal claim). The federal claim must be addressed specifically in the state court pleadings so that "there should be no doubt from the record that a claim under *federal* statute or the *Federal*

Constitution was presented in the state courts." *Webb*, 451 U.S. at 501.

Petitioners did not raise a federal issue in the WV Supreme Court in conjunction with their requests that Justice Starcher recuse himself. In the introductory paragraph of their Joint Motion to Recuse the Honorable Larry Starcher, and throughout the ensuing twelve numbered paragraphs, petitioners repeatedly invoked Rule 29 of the West Virginia Rules of Appellate Procedure and Canon 3(E)(1)(a) of the West Virginia Code of Judicial Conduct as the legal basis for their recusal request. Nowhere did petitioners cite or otherwise refer to the Fourteenth Amendment of the United States Constitution. Indeed, they made only one passing reference to due process in general, stating that the "underlying rationale for disqualification is based on principles of due process." Petitioners then cited to a West Virginia state–law case—*Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976)—as the basis for their assertion.

Petitioners' subsequent filings further establish that their claims were based exclusively on state law. Petitioners filed a Renewed Joint Motion to Recuse the Honorable Larry Starcher on approximately March 8, 2008 and a third filing, entitled Petitioners' Joint Submission in Support of their Renewed Motion to Recuse the Honorable Larry Starcher, just a few weeks later on March 28, 2008. In each, petitioners argued that Justice Starcher's purported comments about Massey constituted grounds for recusal "in accordance with the mandates of Rule 29 of the West Virginia Rules

of Appellate Procedure and Canon 3E of the West Virginia Code of Judicial Conduct." Finally, petitioners filed a Second Joint Submission in Supplementation of their Renewed Motion to Recuse the Honorable Larry Starcher on or around April 4, 2008. Petitioners also repeatedly referred to Rule 29 and Canon 3 in this 8–paragraph submission. Nowhere in any of these filings did petitioners argue that Justice Starcher's failure to recuse himself would violate the Due Process Clause or any other provision of the Untied States Constitution.

Because petitioners did not argue that the Due Process Clause of the Fourteenth Amendment required Justice Starcher to recuse himself, this Court lacks jurisdiction to consider this issue.

2. Certiorari is Not Warranted to Apply Well–Established Law on Bias to Justice Starcher's Comments About Massey's Efforts to Influence the WV Supreme Court

The highly–unique facts surrounding the motion to recuse Justice Starcher in this case—including the political activities of Massey and Mr. Blankenship undertaken to influence the composition of the WV Supreme Court, Justice Starcher's criticism of those efforts, the public perception of the entire WV Supreme Court, and the Justices' action (or inaction) to address that perception—render this case inappropriate for certiorari. The case does not involve a conflict among federal courts or between a federal court and a state court regarding a federal issue. *See* S. Ct.

Rule 10(a)(2008). It does not involve a conflict among the state courts of last resort regarding an important federal issue. *Id.* at 10(b). It does not involve an important federal question that has not been, but should be, settled by this Court. *Id.* at 10(c). This case involves nothing more than petitioners' assertion that Justice Starcher misapplied well–established recusal law in the highly unique facts of this particular case.

Ironically, the amicus brief filed by the National Mining Association ("NMA") succinctly summarizes the reason that this Court should not review Justice Starcher's recusal analysis. The NMA correctly states that "this Court's charge is not to sit as a court of error correction; the Court 'rarely' grants certiorari 'where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.' S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances." Brief Amicus Curiae of the National Mining Association in Support of Petitioners, p. 7. Petitioners do not ask this Court to articulate or explicate the law regarding recusal based on statements evidencing bias. That law is well established. Instead, petitioners ask this Court to correct Justice Starcher's purported misapplication of that law to the unique factual circumstances of this case. The Court should not grant certiorari for this purpose and sit as a court of error correction.

Furthermore, Justice Starcher's criticism of Massey's conduct did not require his recusal under

well–established law on bias. The fact that a judge publicly disapproves of a party's conduct generally does not require the judge's recusal in cases involving that party. As one Circuit Court has explained:

> [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair–minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep–rooted than an attitude of disapproval towards certain persons because of their known conduct, unless the attitude is somehow related also to suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.

United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). Extrajudicial comments only establish bias if they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *Christo v. Padgett*, 223 F.3d 1324, 1333–34 (11th Cir. 2000); *see also United States v. Salemme*, 164 F. Supp.2d 86, 105 (D. Mass. 1998) ("judges are usually

longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially.").[9]

The Ninth Circuit's ruling in *Conforte* is particularly instructive. Following a bench trial in that case, the defendants were convicted of tax evasion in conjunction with their operation of a legalized house of prostitution in Nevada. *Conforte*, 624 F.2d at 873. The defendants asserted that the trial judge was biased, and should have been disqualified, because he had previously (1) advised the University of Nevada not to accept contributions from defendants because they were "not good for Reno" and (2) rejected defendants' application for membership in the American Contract Bridge League's Reno United when the judge was serving as its president. *Id.* at 878–79. The Ninth Circuit concluded that the trial judge's disapproval of the defendants' conduct, in operating a brothel, did not establish such a deep–rooted animus against them that required his disqualification—even though the case was a bench trial involving the operation of the brothel, the very conduct that the judge criticized. *Id.* at 881.

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[9] West Virginia applies the same standard for evaluating potential bias. *Taylor Cty. Comm'n v. Spencer*, 285 S.E.2d 656, 664 (W. Va. 1981) (judge's comments that unfavorably compared the court's facilities to those of the county commissioners did not establish a bias that required him to recuse himself from a case involving the county commission).

In this case, petitioners mischaracterize Justice Starcher's comments by ignoring their context and arguing that they demonstrate "personal antagonism" against Massey and Mr. Blankenship. Petitioners overlook the fact that Justice Starcher's comments pertain to well known and highly–publicized efforts by Massey and Mr. Blankenship to elect new justices to the WV Supreme Court. In particular, 10 of the 11 comments that petitioners identified as evidence of bias in their original motion seeking Justice Starcher's recusal involved Justice Starcher's comments on very specific behavior of which he disapproved. Justice Starcher disapproved of Massey's attempts to exert influence over the WV Supreme Court, including Mr. Blankenship's vacation with one of the justices while cases involving Massey were pending, and Mr. Blankenship's staggering financial contributions in order to elect another justice that he favored. When viewed in the proper context, Justice Starcher's comments do not suggest that he harbors a deep–rooted, personal aversion or animus against Massey or Mr. Blankenship. His comments instead suggest that Justice Starcher disapproved of their efforts to exert an undue influence over the WV Supreme Court.

Because judges have unique knowledge and perspective involving issues that affect the administration of justice, ethical rules governing their conduct permit—and indeed encourage—them to comment on those issues. *See* West Virginia Canons of Judicial Conduct, Canon 4B, cmt. (2008) ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute

to the improvement of the law, the legal system, and the administration of justice ..."); *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (reversing sanctions imposed upon a judge because his criticisms "dealt with the administration of the county justice system by county officials, a matter about which Scott, as an elected judge from that county, was likely to have well–informed opinions.").

Thus, although Justice Starcher was critical of Massey's and Mr. Blankenship's attempts to influence the administration of justice, his disapproval of those political activities does not evidence a deep–rooted and personal bias. Justice Starcher was therefore not constitutionally required to recuse himself in all cases involving Massey, particularly in cases—like this one—in which the political efforts of Massey and Mr. Blankenship are not at issue.

3. Petitioners' Reliance Upon Justice Starcher's Recusal in a Different Case Involving Massey is Misguided

Petitioners' recusal argument rests, in significant part, upon the fact that Justice Starcher recused himself from a different case involving Massey in the past. Their reliance upon Justice Starcher's conduct in another case is legally and factually misguided.

From a legal standpoint, the lower courts are in agreement that a judge's decisions to recuse in a particular case does not require recusal in a

subsequent case involving the same party. *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) ("Judge Vela's disqualification was not required ... merely because he voluntarily withdrew from another case in which Elder was the defendant."); *In re Webster*, 382 F.2d 79, 84 (9th Cir. 1967) (fact that the judge recused himself in response to a similar motion in a different case is irrelevant and does not constitute an admission of bias); *Person v. General Motors Corp.*, 730 F. Supp. 516, 519 (W.D.N.Y. 1990) ("the fact that I recused myself from [an earlier case] does not mandate that I must recuse myself from the present case.").[10] As the Ninth Circuit has explained, a judge's decision to recuse is not an admission of bias:

> The fact that the judge, in response to a similar motion, disqualified himself in [earlier litigation], is immaterial. The judge may have then thought that, although not personally biased, certain of his remarks may have given Webster cause to believe that the judge was, for

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[10] State courts, including those in West Virginia, have similarly held that a judge's recusal in one case does not require subsequent recusals in cases involving the same party or issues. *In re Disqualification of Martin*, 657 N.E.2d 1334, 1334 (Ohio 1990) ("The voluntary recusal by a judge from an earlier case does not by itself support the judge's disqualification from another unrelated case involving the same party."); *Spencer*, 285 S.E.2d at 663–64 (rejecting argument that circuit court judge had admitted bias by previously disqualifying himself from a prior case involving the county commission, and therefore was required to recuse himself in subsequent cases involving the commission).

> the moment, somewhat less than objective in his consideration of Webster's argument. A judge who, out of an abundance of caution and a sincere desire to provide a fair hearing, takes such means to withdraw from a particular case, is not thereby committed to a consistent course of recusing himself in all subsequent cases involving the same party.

Webster, 382 F.2d at 84; *see also Person* 730 F. Supp. at 519 ("My decision to recuse myself [in a prior case] was neither an acknowledgment of the legal sufficiency of counsel's motion in that case, nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him."). In fact, judges sometimes disqualify themselves for reasons other than those set forth in a party's motion for recusal. *Merkt*, 794 F.2d at 960 (rejecting argument that judge's disqualification in a prior action constituted an admission of bias because, in that prior action, the judge's recusal order stated that the recusal was based on other reasons).

From a factual standpoint, Justice Starcher (like the judge in *Merkt*) expressly stated in recusing himself from the prior matter—*Caperton v. A.T. Massey Coal Co.*—that his reason for doing so *was not* because he was biased against Massey. On the contrary, Justice Starcher stated that he voluntarily reconsidered his prior decision not to recuse himself because of the public revelation that another member of the WV Supreme Court, Justice Elliot Maynard, had been engaged in secret and improper

dealings with Massey that had caused the public to scrutinize *all* of the Justices' relationships with Massey in a far different light. *See* Opinion in *Caperton* dated February 15, 2008. Justice Starcher explained in his 10–page opinion in *Caperton* that he was not "reversing" his prior decision as incorrectly made and, in fact, had properly refused to recuse himself from numerous cases involving Massey in the past because his public comments did not create the appearance that he could not be fair. *Id.* at pp. 1–2.

Justice Starcher recognized, however, that the recent developments involving Justice Maynard had at least temporarily changed the landscape in which the public viewed Massey's interactions with and influence over *all* members of the WV Supreme Court. *Id.* at pp. 3–4. Because these developments resulted in the case taking on "enormous public proportions," Justice Starcher recused himself in *Caperton* in an attempt to help restore confidence in the WV Supreme Court and its ability to fairly adjudicate disputes involving Massey. He simultaneously implored a third member of the WV Supreme Court, Justice Brent Benjamin, to recuse himself in light of the public outcry resulting from the fact that Mr. Blankenship had spent $3 million to assure Justice Benjamin's election to the WV Supreme Court. *Id.* at pp. 4–7.

When petitioners subsequently moved to recuse Justice Starcher in this case, the circumstances had changed. Justice Starcher therefore no longer believed that his recusal would be beneficial to the judicial system. Because Justice

Starcher was not biased, and was not obligated to recuse, he properly declined to recuse himself in this case. Petitioners' contention that he was obligated to do so because he recused himself in *Caperton* is baseless.

C. Certiorari is Not Warranted to Review the Trial Court's 32–Paragraph Findings of Fact and Conclusions of Law Upholding the Punitive Damage Awards

Petitioners' attack on the punitive damage awards, in a separate petition (08–218), is based entirely on a profound mischaracterization of the Trial Court's review of those awards. Petitioners argue that the Trial Court "rubber stamped" the punitive damage awards by "baldly" stating that (1) petitioners' conduct was reprehensible and (2) the punitive damage awards do not exceed the compensatory damages. *See* Petition for a Writ of Certiorari (No. 08–218) at i and 19–20. Nothing could be further from the truth.

First, the record below establishes that the Trial Court performed an exhaustive review of the punitive damage awards. The Trial Court received and reviewed lengthy post–trial briefs, including petitioners' 27–page brief in which they argued that the punitive damage awards were not justified. The Trial Court also entertained oral argument on the appropriateness of the punitive damage awards. Finally, the Trial Court entered a lengthy opinion, containing 32 separate findings of fact and conclusions of law that served as the bases for its conclusion that the punitive damage awards were

proper. Under these circumstances, petitioners' contention that the Trial Court merely "rubber stamped" the jury's punitive damage awards is specious.

Second, the Trial Court's description of petitioners' conduct involved far more than making a "bald statement" that petitioners' conduct was reprehensible. The Trial Court expressly identified a number of the facts that made petitioners' conduct particularly reprehensible. The Trial Court also stated that the substantial costs of prosecuting the case, which required a massive amount of discovery and a five–week trial further supported the punitive damage awards. The Trial Court clearly did not simply assert that petitioners' conduct was reprehensible, but instead provided a reasoned explanation for its conclusion that petitioners' conduct was so reprehensible that it justified the punitive damage awards.

Third, the Trial Court's extensive analysis in its opinion disproves petitioners' assertion that the Trial Court "treated a low ratio of punitive to compensatory damages as a safe harbor, upholding [the] multi–million–dollar punitive awards without regard to the reprehensibility of the conduct." The ratio of punitive to compensatory damages—the second of the three guideposts set forth in *BMW*—is unquestionably one of the most critical factors in the review of a punitive damage award. The Trial Court properly considered this factor, noting that the punitive damage awards bore a reasonable relationship to the compensatory damages caused and awarded, and that the punitive damage awards

when combined together are still less than the compensatory damage award.[11] This analysis, combined with the 31 additional paragraphs detailing the Trial Court's other grounds for upholding the punitive damage awards, conclusively demonstrates that the Trial Court did not simply "rubber stamp" the punitive damage awards because they were merely 42% of the compensatory damage award.

Finally, while petitioners contend that granting certiorari would provide lower courts with "needed guidance," they do not set forth the nature of the guidance that they seek. Petitioners are not seeking to modify or supplement the *BMW* guideposts that lower courts are to consider. Nor are they asking the Court to rule that lower courts are prohibited from considering a particular type or category of evidence in applying the *BMW* factors. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003) (holding that a defendant's misconduct that is dissimilar to the conduct giving rise to the claim and harm suffered by the plaintiff cannot serve as the basis for punitive damages); *BMW*, 517 U.S. at 572–73 (holding that lawful out–of–state conduct that does not have an impact on the state or its residents cannot serve as a basis for punitive damages). Petitioners do not take issue with the application of the *BMW* factors in a manner that transcends this case and would

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[11] In this instance, the ratio was remarkably low. The $50 million punitive damage award imposed against each petitioner was only 0.42 times the nearly $120 million in compensatory damages.

establish a new legal proposition generally applicable to future punitive damage cases. They argue instead that the Trial Court must have misapplied the *BMW* factors because it found the punitive damage awards to be warranted. Though cloaked as a request that this Court provide guidance to lower courts, petitioners in reality simply disagree with the Trial Court's application of those well–established factors to the facts of this case.

This Court is not a court of error correction. A properly–instructed jury imposed the punitive damage awards in this case after a five–week trial. While petitioners are entitled to believe that that the jury, the Trial Court, and the WV Supreme Court were all incorrect, they are not entitled to a third attempt to convince a tribunal that the jury was wrong.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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Dated: October 22, 2008

APPENDIX

APPENDIX A

CASE 05-C-85 BROOKE

WHEELING PITTSBURGH STEEL CORP vs.
CENTRAL WEST VIRGINIA ENERGY C

LINE	DATE	ACTION
1	04/27/05	CASE FILED
2		CIVIL CASE SHEET
3		COMPL WITH EX "A" ATTACHED
4		SUMM,COMPL & NOTICE OF SERVICE ISSUED & SENT TO SOS FOR
5		SERVICE ON CENTRAL WV ENERGY CO.
6		NOTICE OF SERVICE BY FIRST CLASS MAIL
7		FILE COPY OF SUMMONS.
8	05/07/05	SUM/COMP RTRND BY SS. ACPTD SRV FOR CENTARL WV ENERGY, 4/28/05
9		CM RTRN CARD FOR CEANTRAL WV ENERGY BY H. BURFORD, 5/2/05
10	05/12/05	COS OF PLTF'S 1ST REQST FOR PROD OF DOC
11		MOT FOR ADMNS PRO HAC VICE/COS E. EXS
12		ORD ADMTNG DAVID B FAWCETT & GREGORY J KROCK PRO HAD VICE IN

13		CV BK 70 PG 741
14	05/17/05	MOT FOR ORD AUTHORIZING ISSURANCE OF SUBP DUCES TECUM DIR TO
15		KINDER MORGAN BULK TERMINALS
16		ORD AUTHORIZING ISSUANCE OF SUPB DUCES TECUM IN CV BK 70 PG 751
17	06/01/05	NOT OF REMOVAL BY DEF, CENTRAL WV ENERGY CO/COS
18	09/01/05	FED ORD GRNTNG PLF'S MOT TO REMAND & DENYNG MOT TO TRANFER VENUE
19		AS MOOT
20		CV DOCKET FROM DISTRICT COURT

* * *

860	09/04/07	ORD DENYING DEF'S MOT & MEMO FOR JDGMNT AS A MATTER OF LAW OR IN
861		ALT, A NEW TRIAL ON THE BREACH OF CONTRACT CLM IN CV BK 76
862		PG 138
863		ORD DENYING PLTF MTN ST CARBON'S MOT TO AMEND FINDINGS AND/OR
864		FOR NEW TRIAL ON SUPLMNTL CNTRCLM IN CV BK 76 PG 139
865		ORD DENYING DEFS' JOINT

		MOT FOR JDGMNT AS A MATTER OF LAW OR IN
866		ALT, A NEW TRIAL BASED UPON THE JURY'S RTRN OF THE VERDICT IN
867		CV BK 76 PG 140
86	09/13/07	TRANSCRIPT OF PROCEEDINGS HELD ON 7/30/07
869	09/25/07	DEFS' JOINT RSPNS TO PLTFS' MOT PURSUANT TO WVRCP 62 FOR AN ORD
870		REQUIRING DEFS T OPOST TWO BONDS/COS
871	10/25/07	ORD OF 9/28/07 WITH CPY OF SURETY BOND FORM AS EX 1 IN CV BK 76
872		PG 386-389
873		DEFS' TENDER OF JOINT APPEAL BOND/COS
874		DEFS' JOINT APPEAL BOND
875		POWER OF ATTY
876	12/10/07	DF'S MASSEY ENERGY CO. DSGNTN OF RCRD W/COS
877		DCKTNG STMNT W/COS MASSEY ENERGY
878		PET FOR APPEAL W/COS MASSEY ENERGY
879		DCKTNG STMNT W/COS CENTRAL WV ENERGY
880		PET FOR APPEAL BY CENTRAL WV ENERGY CO.
881	01/10/08	CM RCPTS ##2234, 2265, 2241,

		2210, 2258, 2227
882		RCPT FROM POST OFFICE
883	01/14/08	6 CM RTRND CARDS FOR WV SUPREME COURT SIGNED BY KATHY THOMAS, 1/
884		11/08
885	06/02/08	CERT CPY OF ORD OF 3/12/08 FROM SUPREME COURT REFUSING APPEAL
886		ENTRD IN CV BK 77 PG 487 (MASSEY ENERGY)
887		CERT CPY OF ORD OF 3/13/08 FROM SUPREME COURT REFUSING APPEAL
888		ENTRD IN CV BK 77 PG 488 (CENTRAL WV ENERGY CO.)
889	07/01/08	CERT CPY OF ORD FROM SUPREME COURT STAYING THE JDGMNT ENTERED IN
890		BRK COUNTY CIRCUIT COURT ENTRD IN CV BK 77 PG 598-59
891	08/25/08	LETTER U.S. SUPREME COURT STATING PET FOR WRIT OF CERTIORARI WAS
892		FILED 8/20/08 & DOCKETED ON 8/21/08 AS NO. 08-217

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NOV 4 - 2008
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No. 08-217

In the Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Brooke County, West Virginia

REPLY BRIEF FOR PETITIONERS

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Bureau of Justice Statistics,
Civil Bench and Jury Trials in State Courts, 2005 (October 2008) 5

REPLY BRIEF FOR PETITIONERS

Seldom does a brief in opposition better prove the need for review than does the one in this case. As we discuss below, respondents rebut none of the propositions underlying our contention that the lower courts need further guidance on the circumstances in which massive punitive damages awards are sustainable. Moreover, their Counter-Statement of Facts serves only to confirm that the conduct in this case barely registers on the reprehensibility scale and surely is insufficiently egregious to support a $100 million exaction.[1]

REPLY STATEMENT OF FACTS

Respondents' Counter-Statement of Facts demonstrates the marginal culpability of Massey's alleged misconduct. Despite asserting that Massey made "[m]any" statements that "were blatantly false" (Opp. 5), respondents fail to identify a single misrepresentation that Massey actually made. Respondents point to company-wide trends and statistics that allegedly contradict Massey's *force majeure* notices—but they gloss over the fact that the notices did not address those macro-level issues. Instead, the *force majeure* letters referred to specific problems with specific coal shipments. Respondents do not, because they cannot, assert that Massey invented, or even overstated, those specific problems.[2] Indeed,

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[1] Petitioners' previous Rule 29.6 Statement remains accurate, except that as of September 30, 2008, no publicly-held company owns 10% or more of Massey's stock.

[2] Respondents also state, incorrectly, that "the jury found that petitioners made a series of misrepresentations." Opp. 3. In fact, the jury was asked only whether Massey "made *one or more* misrepresentations *or* withheld infor-

their own executives and expert witnesses conceded that virtually all of the specific events described in the notices in fact occurred. See Pet. 6-7.

For instance, respondents allege that Massey represented that it "experienced catastrophic railcar shortages in 2004 and 2005," and they contrast that statement with the fact that "Massey received more railcars in 2004 and 2005 than the previous years." Opp. 5-6. But the *force majeure* notices in question said only that Massey had received fewer railcars than requested on specific routes in specific months and that individual trains were delayed. Pet. 6; *e.g.*, Pl. Ex. 165B at 5, 7, 10, 11. Respondents offered no evidence at trial that those statements were false. Similarly, respondents contrast Massey's purported statement that it "experienced severe labor shortages" with evidence that the company "employed more workers in 2004 than 2003, and then even more workers in 2005." Opp. 6. But the relevant *force majeure* notices all mentioned *particular* job vacancies or mines—shortages that were never disputed at trial. *E.g.*, Pl. Ex. 165 B at 6, 13.

Finally, respondents contend that "Petitioners falsely represented that Massey experienced unforeseen mining conditions that decreased its production." Opp. 6. Though there is dispute around the margins as to the precise effect of certain such conditions and the meaning of particular words in the *force majeure* notices, respondents' expert admitted that most of these events occurred and affected production. See Tr. 2335, 2344, 2350, 2355-56, 2357-58, 2359-60, 2363-64, 2365, 2367-68, 2371, 2377.

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mation related to or concerning a material fact." Tr. 5566 (emphasis added).

Respondents' other allegations—even taken at face value—are hardly the type of conduct that warrants a nine-figure punitive award. Respondents claim that Massey did not keep extra-contractual, oral promises to conduct "diligent remedial efforts" against the supply interruptions. Opp. 6. They contend that Massey's open-market purchases of coal—which were not required by the contract—declined in 2004. *Id.* at 7. And they repeat the claim that Massey somehow concealed its sales to other customers. *Ibid.* Even assuming that West Virginia law requires suppliers to disclose publicly all new contracts, respondents admit that they read about the new sales in trade publications. *Ibid.*; see also Tr. 600-01. None of these allegations justifies the gargantuan punitive award.

ARGUMENT

Respondents do not deny that due process compels reviewing courts to consider whether the amount of punitive damages imposed by the jury is greater than reasonably necessary to punish and deter. They do not deny that the West Virginia courts conducted no such inquiry here. And they do not deny that the failure to do so in this case is illustrative of a pervasive problem.[3] They instead argue that review is unwarranted principally because the Circuit Court made 32 findings of facts and conclusions of law.

But those findings do not explain why a $100 million exaction that far exceeds any penalty that would or could be imposed through the criminal

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[3] For a discussion of the recurring nature of the problem, see Brief for Amicus Curiae The American Chemistry Council in Support of Petitioners at 10 & n.4.

process or by an expert regulator *for more heinous conduct* is necessary, or why "a lesser deterrent" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 584 (1996)) would not suffice to satisfy West Virginia's punitory interests. In particular, although one of the findings acknowledges that the compensatory damages exceed the profits from the alleged misconduct, there is no analysis whatever as to why a further award of $100 million in punitive damages is necessary in such circumstances.[4]

Moreover, although the findings label Massey's conduct "reprehensible," nowhere do they explain why that conduct was so reprehensible as to necessitate a nine-figure punishment. Contrary to respondents' assertion (Opp. 35), the Circuit Court did not "provide[] a reasoned explanation for its conclusion that petitioners' conduct was so reprehensible that it justified the punitive damage awards." Rather, it simply described the conduct found by the jury to be fraudulent (and characterized as sinister actions that almost anyone else would deem to be good faith). See Pet. 8 & n.4. The court made no attempt to place the conduct on a spectrum of reprehensibility, much less to explain why it warranted a penalty that is tens of millions of dollars greater than the punitive awards found by other courts to be the constitutional maximum for conduct that is undeniably more egregious.

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[4] Respondents suggest that this case involves two $50 million punitive awards, rather than a single $100 million exaction. See Opp. 36 n.11. Given that the two awards were imposed against members of the same corporate family for a single course of conduct, that is a quibble that should make no difference.

New statistics from the Department of Justice confirm that this case is symptomatic of a broader problem: Juries award punitive damages more often, in larger dollar amounts, and at higher ratios in ***contract-related cases*** than in pure tort cases. See Bureau of Justice Statistics, *Civil Bench and Jury Trials in State Courts, 2005*, at 6 t.7, 7 t.8 (October 2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf. Without judicial review far more searching than was provided in this case, the severity of punishment will continue to bear little connection to the reprehensibility of the defendant's conduct.

Finally, respondents assert that we "do not set forth the nature of the guidance" we seek from this Court. Opp. 36. Not so. As we explained in the petition (at 13), "[r]eview is urgently needed to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence." In particular, this Court's intervention is needed "to make clear to lower courts that * * * perfunctorily labeling the conduct 'reprehensible' and observing that the ratio of punitive to compensatory damages is low is not enough to justify an eight-, nine-, or ten-digit punitive award." *Id.* at 3; see also *Amici Curiae* Brief of American Tort Reform Association, Chamber of Commerce of the United States of America, West Virginia Chamber of Commerce, and American Gas Association in Support of Petitioners at 8-15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 08-217 & 08-229

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IN THE

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ESTATE OF GARRISON G. TAWNEY BY LELA ANN GOFF,
EXECUTRIX, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the Circuit Courts of Brooke County and Roane County, West Virginia

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BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae the American Chemistry Council ("ACC"),[1] represents the leading companies engaged

[1] No counsel for a party authored this brief in whole or in

in the business of chemistry, a $635 billion dollar industry that accounts for ten cents of every dollar in U.S. exports. ACC members apply the science of chemistry to create and manufacture innovative products and services that make the lives of people throughout this nation and abroad better, safer, and healthier. In support of these objectives, ACC regularly files briefs as amicus curiae in this Court and in other courts in cases that are significant to its members.

Like other businesses, ACC members are vitally interested in ensuring that courts undertake the rigorous and meaningful review of punitive damages mandated by this Court's precedents, which aim to eliminate the arbitrary nature and potentially crippling effects of such awards. ACC also has a particular interest in ensuring that this review occurs with respect to awards rendered in the State of West Virginia. ACC member companies comprise an important part of the West Virginia business community, having contributed $14.1 billion dollars to that State's economy in 2007 alone. *See* American Chemistry Council, *Snapshot of the Chemical Industry in West Virginia 2007*. As such, ACC members are unfortunately all too familiar with excessive punitive damage awards in West Virginia. Of the seven largest damage awards in the United States in 2007, three were imposed by West Virginia juries,

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part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to S. Ct. R. 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief. The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk.

including the two nine-digit awards at issue in these cases. *See* Verdict Search, *Top Verdicts of 2007*. The third such award, which included $196.2 million in punitive damages, was imposed against an ACC member. *See Perrine* v. *E.I. DuPont de Nemours & Co.*, No. 081461 (W. Va.) (petition for review filed June 24, 2008). To date, none of these awards has been reduced or reversed.

Unchecked punitive awards threaten to stifle the Nation's economy by destroying the legal predictability upon which investments are predicated. Accordingly, this Court, through its faithful application of the Due Process Clause of the U.S. Constitution, has sought to limit the arbitrary and excessive nature of punitive damage awards by setting forth standards under which courts must rigorously evaluate them. But the standards are meaningful only to the extent the lower courts will consistently apply them in a rigorous manner. Unfortunately, that consistency has been lacking, particularly in West Virginia, where there is no appellate review as of right and where trial courts too often view the due process review mandated by this Court as little more than a ministerial act to be quickly passed over on the way to confirmation of the jury's award.

ACC therefore urges the Court to grant review in these cases, to clarify that the Due Process Clause imposes real limits on all punitive awards—not merely those with numerically high ratios of compensatory to punitive damages—and to ensure the meaningful review of these massive punitive awards that the West Virginia courts declined to provide.

INTRODUCTION

This Court has emphasized the need for a "thorough, independent review" of the record and "[e]xacting appellate review" of punitive damage awards, to ensure that such awards are not grossly excessive in violation of the Due Process Clause of the Constitution. *Cooper Indus.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). In these cases, however, trial judges in West Virginia essentially rubberstamped two massive punitive awards—totaling $370 million—with only perfunctory review. And far from engaging in the requisite thorough and exacting review mandated by the Due Process Clause, the Supreme Court of Appeals of West Virginia—the only appellate court in the State—*denied* review of these awards altogether.

These exceptional cases warrant this Court's intervention. The Court should clarify that the Due Process standards are not merely boxes to be checked off but rather require an extensive multifactor judicial review as to the excessiveness of each award, regardless of the precise numerical ratio of compensatory to punitive damages and regardless of whether the conduct at issue could be labeled reprehensible in some sense of that word. The Court should further clarify that, in the event the Supreme Court of Appeals of West Virginia declines to do so, this Court will safeguard the federal constitutional rights of defendants in that State by conducting the requisite thorough and exacting review on its own in extraordinary cases such as these.

Members of the ACC comprise a prominent part of the West Virginia business community, and have

experienced first-hand the dangers inherent in allowing trial judges virtual free rein—unconstrained by any mandatory appellate review—to uphold devastating punitive jury awards. ACC therefore urges this Court to accept review in these cases, so as to provide the searching evaluation and protection of federal constitutional rights that the West Virginia courts have declined to provide.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD CLARIFY THAT THE DUE PROCESS CLAUSE IMPOSES MEANINGFUL LIMITS ON ALL PUNITIVE AWARDS, NOT MERELY THOSE WITH HIGH RATIOS OF PUNITIVE TO COMPENSATORY DAMAGES.

Only months ago, this Court held that, even in the absence of a proliferation of runaway punitive awards, there still remains a "need to protect against the possibility * * * of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution." *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2633 (2008). Thus, this Court has emphasized that *every* jury award of punitive damages must survive exacting scrutiny under the Due Process clause and also must be subject to meaningful appellate review.[2] "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of the law' rather than a deci-

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[2] *See, e.g.*, *Exxon*, 128 S. Ct. at 2605 ("[O]ur cases have announced due process standards that *every* award must pass.") (emphasis added); *Cooper Indus.*, 532 U.S. at 436 ("courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards").

sionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (internal quotation omitted).

The linchpins of this scrutiny are the three "guideposts" announced in *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 574-75 (1996), and the Court has not hesitated to apply them to strike down excessive punitive awards. *See State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. 574-75. They are (1) the degree of reprehensibility of the defendant's misconduct; (2) the ratio of punitive damages to the actual or potential harm to the plaintiff, which is generally (but not always) measured by the compensatory damages; and (3) the relationship between the award and civil fines authorized or imposed for similar misconduct.

These guideposts were dictated by the precept that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. As the Court noted recently, "[t]he real problem * * * is the stark unpredictability of punitive awards," which prevents defendants from looking ahead "with some ability to know what the stakes are in choosing one course of action or another." *Exxon*, 128 S. Ct. at 2625, 2627.

But the Court's standards are meaningful only if they are actually applied by the lower courts in a meaningful way. Otherwise, the unpredictability of local juries will simply be exacerbated by the unpredictability in how local courts review those juries' actions. The lower courts, however, differ greatly in how rigorously they apply this Court's standards. The result—especially in West Virginia, which has

no mandatory appellate review—has been realization of the very danger that those standards seek to avoid: the arbitrary imposition of excessive punitive awards according to standards that vary from court to court. The cases at bar provide an excellent vehicle for the Court to clarify that all three *BMW* guideposts are real limitations to be applied searchingly in every case, and not merely hoops through which judges must jump on their way to confirming awards.

1. Many courts have incorrectly viewed punitive awards that are a single-digit multiple of the compensatory award as largely insulated from meaningful due process scrutiny.[3] While awards with high

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[3] *See, e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) ($5 million punitive award that was 5.65 times compensatory damages and prejudgment interest is "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (4:1 ratio acceptable even when compensatory award is substantial and punitive award of $2 million is many times defendant's net worth); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 Fed. App'x 539, 542 (9th Cir. 2004); ($2.4 million punitive award permissible because ratio at issue was "similar to the 4:1 ratio in BMW and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $ 2.6 million punitive award and ratio of "slightly more than seven to one"); *Trinh* v. *Gentle Commc'ns, LLC*, 71 Mass. App. Ct. 368 (Mass. App. Ct. 2008) (slightly less than 4:1 ratio acceptable); *Galindez* v. *Narragansett Hous. Assocs., L.P.*, 2006 Del. Super. LEXIS 476 (Del. Super. Ct. Nov. 28, 2006) (ratio of 3.3:1 does not shock the court's conscience); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004) ($25 million punitive award appropriate because a 5:1 ratio is not "breathtaking"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 ratio "is something of a benchmark for the United States Supreme

ratios are almost always unconstitutionally excessive, the obverse is not true: the mere fact that a substantial award may involve a single-digit, or less than one-to-one, ratio cannot insulate the award from meaningful scrutiny. There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). Thus, while a one-to-one ratio is a general "outermost limit" when compensatory awards are substantial, *Exxon*, 128 S. Ct at 2626; *State Farm*, 538 U.S. at 425, the limit for any particular award may well be lower, in light of the magnitude of the award, the degree of reprehensibility, the actual harm to the plaintiff caused by the egregious conduct, comparative civil penalties, and other factors.

These cases amply illustrate this point. The trial courts' consideration of the ratio of punitive damages to compensatory damages was cursory at best. In *Massey*, the court's analysis of the relationship between the $100 million punitive award and the $119 million compensatory award rested solely upon its superficial observation that the "punitive damages are less than the compensatory damage award." *Massey* Pet. App. 11a. For its part, the *NiSource* trial court flatly refused to consider this Court's guidance in *State Farm* suggesting that a one-to-one ratio was the outer limit for punitive awards, on the ground that the $134 million compensatory award was "not substantial" because it was to be shared among a class of plaintiffs. *NiSource* Pet. App. 101a-

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Court" and reducing 45:1 ratio to 7:1), *modified*, 79 P.3d 908 (Or. Ct. App. 2003).

127a. Similarly, in the *Perrine* v. *DuPont* case, which is currently pending on petition seeking review by the Supreme Court of Appeals of West Virginia, the trial court dismissed concerns over a $196.2 million punitive award on the cursory conclusion that either a 1:1 or 3.5:1 ratio (depending on which non-punitive damages are included in the ratio) was "constitutionally sound" under this Court's precedents. Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award, *Perrine* v. *DuPont E.I. de Nemours & Co.*, No. 04-C-296-2 (W. Va. Cir. Ct. Feb. 25, 2008).

A very large punitive award on top of a very large compensatory award, even where the ratio is relatively low, will raise more serious due process concerns than a small punitive award on top of a small compensatory award where the ratio is high. For example, a $100 punitive award on top of a $10 compensatory award is hardly momentous even though the ratio is ten-to-one. But a $100 million punitive award on top of an equally large compensatory award mandates searching review based on the magnitude of the award alone. As the Court has observed, even a $2 million dollar punitive award—a tiny fraction of the awards made in the present cases—is "tantamount to a severe criminal penalty." *BMW*, 517 U.S. at 585.

The ultimate question as to the constitutionality of any punitive award is whether the conduct at issue "warrant[s] the imposition of further sanctions to achieve punishment or deterrence" and whether the amount of such sanction is greater than reasonably necessary to achieve the State's goals in imposing punitive damages. *State Farm*, 538 U.S. at 419. Under any meaningful degree of scrutiny, the recent

nine-digit awards in West Virginia are grossly disproportionate to any legitimate need for punishment or deterrence, regardless of the ratio of compensatory to punitive damages. These three massive awards alone threaten to extract more than $566 million from the defendants, a figure equivalent to 15% of the 2007 annual revenues for the entire State of West Virginia. *See* West Virginia State Budget Office, *Governor's FY 2009 Budget Report*, at 16.

Although jurors may perceive such windfalls as economically beneficial to their State or their fellow citizens, especially when imposed on large and often out-of-state corporations, meaningful judicial review is necessary to ensure that these impulses are cabined by rationality. And while West Virginia is of particular concern, the problem is not limited to that State. Just in the last two years, there have been at least ten verdicts throughout the country—including the three in West Virginia—where the punitive damages exceeded $50 million but the ratio of punitive to compensatory damages was less than four-to-one.[4] Notably, however, many of these awards have

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[4] *Motorola Credit Corp.* v. *Uzan*, 509 F.3d 74 (2d Cir. 2007) ($1 billion punitive award; 0.5:1 ratio); *Poliner* v. *Tex. Health Sys.*, 537 F.3d 368 (5th Cir. 2008) ($100 punitive award; 0.9:1 ratio; reversed); *L-3 Commc'ns Corp.* v. *OSI Sys.*, 2008 U.S. App. LEXIS 13645, 1-2 (2d Cir. 2008) ($96 million punitive award; 2.9:1 ratio; reversed); *Adidas Am., Inc.* v. *Payless Shoesource, Inc.*, 2008 U.S. Dist. LEXIS 69260 (D. Or. 2008) ($137 million punitive award; 0.82:1 ratio; remitted); *Banco Espirito Santo Int'l* v. *BDO Seidman*, No. 2004-14009-CA-31 (Fla. Cir. Ct. 2007) ($351 million punitive award, 2.1:1 ratio); *10K, L.L.C.* v. *W.V.S.V. Holdings, L.L.C.*, No. CV 2003-008362 (Ariz. Sup. Ct. 2007) ($150 million punitive award; 0.71:1 ratio); *Rowatt* v. *Wyeth Pharm., Inc.*, No. 04-01699 (Nev. Dist. Ct. 2007) ($99 million punitive award, 2.8:1 ratio).

been vacated, reversed, or reduced on judicial review but *not* those in West Virginia.

Regardless of how common such awards are, businesses will still face intolerable and unconstitutional unpredictability in the absence of consistent and rigorous application of this Court's due process standards. The mere specter that juries will award arbitrary nine-digit punitive awards and that courts will routinely uphold them with only cursory review is itself sufficient to deter the investment necessary for continued economic growth. This Court should therefore grant certiorari in these cases to convey to the lower courts the message that *all* punitive awards are to be subjected to meaningful judicial scrutiny.

2. Many courts also give little more than superficial attention to the relationship between awards of punitive damages and the degree of the defendant's reprehensibility. As this Court has emphasized, a punitive award does not satisfy due process merely because it could be characterized as "reprehensible" in some sense of that word. For *all* punitive damage awards, in order to be permissible in any amount, must cross the reprehensibility threshold. Rather, the Court has explained that the due process inquiry requires measuring the award against the "*degree* of reprehensibility." *BMW*, 517 U.S. at 575 (emphasis supplied).

It is therefore insufficient for a reviewing court to say that a defendant's conduct is reprehensible and declare its job done. Yet many courts have done essentially that, viewing the reprehensibility guidepost as little more than a box to be checked off rather than a searching inquiry that balances the degree of

culpability against the magnitude of the award and all other relevant factors. *See, e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Watson* v. *E. S. Sutton, Inc.*, 225 Fed. Appx. 3, 5 (2d Cir. 2006); *Century Surety Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Cal. Ct. App. 2006); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Leary* v. *State Farm Mut. Auto. Ins. Co.*, 978 So. 2d 1094, 1102 (La. Ct. App. 2008); *Trinh*, 71 Mass. App. Ct. at 368; *Atler* v. *Murphy Enters.*, 136 N.M. 701, 709 (N.M. Ct. App. 2004).

The present cases highlight the lower courts' misapplication of the due process guideposts. The *Massey* court upheld a punitive award of $100 million dollars based on its conclusion that the petitioners' behavior in a garden-variety commercial contract dispute was "reprehensible." *Massey* Pet. App. 11a. But the court made no mention of the *degree* of the reprehensibility, and gave no explicit consideration of the numerous factors this Court set forth in *State Farm* to guide the reprehensibility inquiry. *Compare id.* with *State Farm*, 538 U.S. at 419. Similarly, the trial court in *NiSource* ignored the *State Farm* factors and merely concluded that the defendants were "significantly reprehensible" when they underpaid royalties based on their interpretation of an ambiguous contract and hedged against declining prices. *NiSource* Pet. App. 105a, 112a-113a, 86a, 88a. This "significant reprehensibility," according to the court, justified a $270 million dollar punitive damages award on top of $134 million in compensatory damages (much of which the trial court admitted could not support any punitive damages). No consideration was given to whether the compensa-

tory damages awarded had already satisfied the societal interest in appropriate deterrence.

Just as a single-digit or even lower ratio of compensatory to punitive damages does not demonstrate the constitutionality of a punitive award, so too a determination that conduct is "reprehensible" cannot short-circuit that inquiry either. The awards at issue in these cases—both of which are simply garden-variety contract disputes dressed up in the garb of fraud claims—afford the Court with an excellent opportunity to provide much needed guidance to the lower courts on this point.

II. THIS COURT'S INTERVENTION IS PARTICULARLY WARRANTED IN LIGHT OF THE FAILURE OF THE WEST VIRGINIA COURTS TO ENGAGE IN MEANINGFUL REVIEW OF THESE AWARDS.

Certiorari would be warranted in these cases regardless of what state they came from. But the need for this Court's intervention is particularly important given that these awards were issued by West Virginia juries with no meaningful review by the trial court and no review at all by the Supreme Court of Appeals of West Virginia. If the West Virginia courts elect not to engage in the meaningful due process review mandated by this Court's precedents, then this Court should step in to ensure that the dictates of the Constitution are followed with respect to these massive verdicts. *See Murray* v. *Charleston*, 96 U.S. 432, 441 (1878) ("Wherever rights acknowledged and protected by [the Constitution] are denied or invaded under the shield of State legislation, this court is authorized to interfere.").

For each of the past three years, the U.S. Chamber of Commerce has ranked West Virginia's legal climate as the nation's absolute worst for businesses.[5] Essential to these overall rankings is each State's ranking on criteria such as verdict predictability, judges' impartiality, and punitive damage awards. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Legal Climate 2008*. West Virginia is consistently ranked at or near the bottom of the Nation in each of these categories. *Id.* at 18, 23, 25. It is this climate that allowed a relatively small State, ranked 37th in the nation in population, to produce three of the Nation's top seven verdicts in 2007. *See also* American Tort Reform Ass'n, *Judicial Hellhole Reports* (West Virginia consistently included in nationwide list of judicial "hellholes" since 2003 and is the only state-wide "hellhole").

Largely unrestrained punitive damages awards have had a palpable effect upon businesses operating within the state of West Virginia. The enormous judgment against one of the *NiSource* petitioners caused that company, immediately after the West Virginia Supreme Court of Appeals denied review, to cancel its decision to locate a $35 million regional headquarters in Charleston, West Virginia. George Hohmann, *Chesapeake Energy Kills $35 Million Regional Headquarters Plans*, Charleston Daily Mail, May 29, 2008, at 1A. Moreover, the $196.2 million in punitive damages awarded in the *Perrine* v. *DuPont* case represents more than 10% of the value of the gross state product contributed to West

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[5] *See* U.S. Chamber Institute for Legal Reform, *Legal Climate 2008*; U.S. Chamber Institute for Legal Reform, *Legal Climate 2007*; U.S. Chamber Institute for Legal Reform, *2006 U.S. Chamber of Commerce State Liability Ranking Study*.

Virginia's state economy by the entire chemical industry for the year 2007. American Chemistry Council, *Snapshot of the Chemical Industry in West Virginia 2007*.

West Virginia's toxic litigation climate has also stifled small businesses. A recent survey of West Virginia small business owners indicated that 60% were concerned about the impact of frivolous lawsuits upon their businesses. Chris Dickerson, *West Virginia Small Business Owners Fear "Unfair" Lawsuits, Study Finds*, The Record, May 27, 2007, at 1. These small business owners are understandably concerned. In 2005, small businesses nationwide incurred $98 billion in tort-related costs, of which $20 billion came from the assets of those businesses rather than insurance. U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Businesses* (May 2007), at 1. The West Virginia Chamber of Commerce has thus recognized that the unpredictable civil justice system in its State "is a consistent drag" on West Virginia's economic growth. West Virginia Chamber of Commerce, *Policy Papers 2009*.

In other States, the arbitrariness of trial court punitive damages awards would be mitigated by the availability of appellate judicial review, usually in the form of one mandatory and one discretionary level of review. But that is not so in West Virginia, which does not provide for any appeal of right in any civil cases. Instead, a would-be appellant must apply to the Supreme Court of Appeals of West Virginia for a discretionary grant of appellate review. As a result, in these cases there was *no* appellate review at all. Despite the nine-figure punitive awards, one of which was the largest punitive award in West Virginia history, the Supreme Court of Appeals

denied the petitions for review in both cases with no explanation. *See Massey* Pet. App. 18a ("Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal."); *Ni-Source* Pet. App. 2a (same).

In fact, the percentage of all cases in which the West Virginia Supreme Court of Appeals has granted review has dropped precipitously over the past few years. Eight years ago, that court granted appeal in 52% of the 3,403 petitions presented to it. *See* Court of Appeals of West Virginia, *2006 Statistical Report* at 13. But by 2006, the last year for which data are available, appeal was granted only 11% of the time although the total number of petitions had dropped by 24% to 2,589. *Id.* There is a similar pattern of decline in the number of appeals granted in purely civil cases. In 2001, appeal was granted in 39% of such petitions. *Id.* at 13. But by 2006, that percentage had been almost cut in half, to 21%. *Id.* Yet during the same time period, the number of civil petition filings dropped by 23%. *Id.* at 10. Thus, at a time when the total dollar value of punitive awards is increasing, the availability of appellate review in West Virginia appears to be decreasing.

This confluence of events leaves litigants in West Virginia subject to the whims of parochial juries and the potential caprice of local elected trial court judges. The dangers of unconstrained jury verdicts are well-recognized. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) (discretionary nature of punitive awards, coupled with evidence of defendant's net worth, "creates the potential that juries will use their verdicts to express biases against big businesses"). But those dangers are greatly exacerbated in West Virginia. Given that there is no

mandatory appellate review of their decisions, trial judges in that State necessarily have reduced incentives to conform their rulings to the dictates of higher authorities. Such arbitrariness is what the Due Process Clause forbids and what exacting appellate review is supposed to prevent. *State Farm*, 538 U.S. at 418.

"[A] right without a remedy is no right at all." *Angel* v. *Bullington*, 330 U.S. 183, 209 (1947). Thus, the Court has not hesitated to grant certiorari to protect federal rights when state courts would not or could not afford the same protection. *See, e.g.*, *Rogers* v. *Alabama*, 192 U.S. 226, 230 (1904) ("It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."). Similarly, the Court has made clear that state courts cannot deprive litigants of constitutional rights by relying on the vagaries of local practice. *Am. Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice."). Review and reversal by this Court is proper when a State treads carelessly on important federal rights. *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935). "Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights." *Id.*

To be sure, the abdication of the West Virginia courts of their responsibility to meaningfully review these punitive awards presents different concerns than earlier efforts by state courts to ignore other federal constitutional rights. But the basic principles are the same. In far less momentous circumstances, this Court has not allowed the West Virginia Supreme Court of Appeals' denial of appeal to insu-

late a case from certiorari review. *See Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135 (2003). Unless this Court intervenes in these cases, the result will be continued uncertainty and unpredictability in the imposition and review of punitive awards in West Virginia. This Court should provide the requisite meaningful review in these important cases, given that the only appellate court in the State has chosen not to.

CONCLUSION

For the foregoing reasons, and those set forth in the petitions, the petitions should be granted and the judgments below reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

Nos. 08-219, 08-229

NISOURCE INC, ET AL.,

Petitioners,

v.

ESTATE OF GARRISON G. TAWNEY BY LELA ANN GOFF, EXECUTRIX, ET AL.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA, RESPECTIVELY

Nos. 08-218, 08-217

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA, RESPECTIVELY

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WEST VIRGINIA CHAMBER OF COMMERCE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the trial courts below erred when they held that the massive punitive damages awards in these actions – *totaling over a quarter of a billion dollars* – involving economic harms and substantial compensatory damages conformed with due process.

2. Whether the Due Process Clause of the Fourteenth Amendment requires States to provide defendants with a right to appellate review of punitive damages awards.

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Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation,* 40 ALA. L. REV. 919 (1989) 6

Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation,* 79 NOTRE DAME L. REV. 2025 (2004) 17

INTEREST OF *AMICI CURIAE*[1]

Amici curiae represent businesses and other entities that often find themselves targeted in civil actions seeking punitive damages. For this reason, *amici* have a substantial interest in ensuring that punitive damages are not excessive and awarded according to procedures that comport with due process. As explained below, we believe these principles were violated in the subject cases.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed punitive damages issues.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

With a 5000 member reach, the West Virginia Chamber of Commerce ("Chamber") is the recognized as the voice of business in West Virginia. In that role, it strives to encourage public policies that foster the relocation of new businesses to and the expansion of existing businesses within the state, so that all West Virginians enjoy the benefits of a robust economy. In furtherance of this goal, the Chamber has been a consistent advocate for a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence so as to ensure that businesses in West Virginia can and do operate under the same general ground rules as their competitors elsewhere in the country.

The American Gas Association ("AGA") is the national trade association representing energy members that deliver natural gas. The AGA represents over 200 distribution companies, located in all 50 states that deliver natural gas to 64 million customers throughout the United States. AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the

filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

STATEMENT OF THE CASE

Amici adopt Petitioners' statements of the cases.

SUMMARY OF ARGUMENT

The punitive damages awards in these actions – a $270 million punitive award that is the largest in the history of West Virginia and a $100 million punitive award that was the third largest upheld by West Virginia courts in 2007 – present recurring issues that merit this Court's attention.

First, the Petitions illustrate the difficulty some courts have had in applying the three "guideposts" this Court set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), to help provide potential defendants with "fair notice . . . of the conduct that will subject [them] to punishment [and] the severity of the penalty that a State may impose." *Id.* at 574. These Petitions present the Court with an opportunity to (1) provide needed guidance and objectivity to *Gore*'s "reprehensibility" guidepost; (2) address confusion that has arisen with respect to the application of *Gore*'s "ratio" guidepost by (a) making clear that the excessiveness inquiry must begin with an examination of whether the actual dollar amount of the award exceeds the State's legitimate interests in punishment and deterrence, and (b) squarely hold that a 1:1 ratio must provide the "fair upper limit," *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008), in cases like these that involve very large compensatory damages and questionable reprehensibility; and (3) clarify the function of the third *Gore* guidepost relating to civil

or criminal penalties that could be imposed for comparable conduct.

Second, these Petitions present the Court with an opportunity to clarify that due process requires at least one meaningful review of a punitive damages award by an appellate court. West Virginia is the only state that denies defendants that right in cases involving substantial punishment.

ARGUMENT

I. THE BACKGROUND IN WHICH THESE PETITIONS SHOULD BE CONSIDERED

For most of this nation's history, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. REV. 1, 2 (1982). Punitive damages, sometimes called exemplary damages, were traditionally reserved for a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass. *See* James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1008 (2000).

Beginning in the late 1960s, however, courts began to allow punitive damages in cases that did not involve intentional misconduct, such as in product liability actions. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action). The "perfect storm" created by the coupling of this dramatic expansion in the law with the advent of "mass torts" began to impact the frequency and size of punitive awards.

For example, until 1976, there were *only three* reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards were relatively modest. *See Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory, $100,000 punitive); *Toole, supra* ($175,000 compensatory, $250,000 punitive); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill. 1970). Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 ALA. L. REV. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years."). One commentator observed, "Today, hardly a month goes by without a

multi-million dollar punitive damages verdict in a product liability case." Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919 (1989).

A similar expansion in the availability of punitive damages occurred in breach of contract cases. As Justice O'Connor observed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting):

> For over 200 years, recovery for breach of contact has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. *See, e.g., Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, [686 P.2d 1158 (Cal. 1984)]. *Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards.* (Emphasis added).

By 1991, this Court expressed concern that punitive damages had "run wild." *Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Between 1996 and 2001, the annual number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A*

Comparative Analysis, 42 COLUM. J. TRANSN'L L. 391, 392 (2004).

Against this backdrop, the Court has established specific measures to guard against arbitrary and excessive punishment, recognizing that the Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural safeguards in punitive damages cases. *See Haslip* (1991), *TXO* (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Gore* (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

In its decisions, the Court has observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432; *Campbell*, 538 U.S. at 417, because "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding." *Campbell*, 538 U.S. at 417. The Court also has recognized that punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and may have "potentially devastating" ramifications for a defendant's character, reputation, business, and good will. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring).[2] Most recently, in

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[2] *See also International Bhd. Of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [a punitive damages award] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 417 (1967) (puni-

Baker (2008), the Court indicated that "runaway" punitive awards may not be "mass-produced," *id.* at 2624, but "the spread is great" and punishment continues to be imposed arbitrarily in outlier cases. 128 S. Ct. at 2625.

The subject Petitions address important punitive damages issues that merit this Court's attention. Section II of this brief discusses the need for this Court to provide additional guidance with respect to the three "guideposts" this Court set forth in *Gore*. Section III discusses the need for this Court to clarify the right of civil defendants to obtain appellate review of punitive damages awards.

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE *GORE* GUIDEPOSTS

This Court in *Haslip* (1991) acknowledged for the first time that excessive punitive damages awards could violate the Fourteenth Amendment. 499 U.S. at 18. The Court upheld the award at issue, but said that a 4-1 ratio between punitive and compensatory damages "may be close to the line" of "constitutional impropriety." *Id.* at 23-24. In *TXO* (1993), a plurality of the Court said that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" 509 U.S. at 454. The Court found that those limits had not been reached in *TXO*, but chose to note once again the *Haslip* Court's observation that a 4-1 ratio "may be close to the line of constitutional permissibility." *Id.* at 459. In *Oberg* (1994), the Court departed from

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tive damages awards have "'momentous and serious' . . . consequences" for civil defendants) (citation omitted).

substantive due process questions, but affirmed "that the Constitution imposes a substantive limit on the size of punitive damages awards." 512 U.S. at 420.

Finally, in *Gore* (1996), the Court struck down an excessive punitive award for the first time. The Court stated: "*Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.*" 517 U.S. at 574 (emphasis added). The Court then provided three "guideposts" for States to follow: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the actual (or potential) harm to the plaintiff, and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 575.

Justice Breyer observed for three concurring justices: "Requiring the application of law, rather than a decision-maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to *assure* the *uniform general treatment* of similarly situated persons that is the essence of the law itself." *Id.* at 587 (Breyer, J., concurring) (emphasis added).

In *Cooper* (2002), 532 U.S. at 400, and *Campbell* (2003), 538 U.S. at 418, the Court reiterated the importance of the *Gore* guideposts. In *Campbell*, as in *Gore*, the Court struck down an excessive punitive award as violating due process.

Amici applaud the Court's leadership in helping to restore some order and fairness in punitive damages cases. The goals of "fair notice" and "uniform

general treatment" that *Gore* sought to provide have been undermined, however, by a lack of clarity as to how the three factors are to be applied. The subject Petitions provide outstanding opportunities for this Court to improve the implementation of the *Gore* guideposts.

1. "Reprehensibility" in Contract Disputes

Gore instructs courts to consider the "degree of reprehensibility of the defendant's conduct" in reasonableness determinations. 517 U.S. at 575.

As explained, a growing number of punitive damages awards arise out of contractual disputes and other alleged financial injuries. *See also* Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 J. LEGAL STUD. 283, 284 (1999) ("[C]ases in which the injuries suffered by the plaintiff are financial in nature receive punitive damages awards much more frequently than cases in which the injuries suffered by the plaintiff are personal in nature."); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 28 (1998) ("Punitive damages play an increasingly prominent role in business . . . cases."); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 757 (2002) ("punitive damages tend to be awarded more frequently in financial injury cases."). As one commentator has summarized:

> According to RAND, in recent years 22.5% of all plaintiff verdicts (14.2% of all verdicts) have resulted in punitive damages in cases involving financial injury. *Financial torts have dominated the mar-*

> *ket for punitive damages in recent years.* According to RAND, financial torts, which made up 13% of all tort cases in America, have produced 50% of all punitive-damages verdicts. One can measure the degree to which punitive damages have dominated financial torts in other ways too: Sixty cents out of every dollar awarded in a financial-tort verdict have been for punitive damages, a far higher amount than any other tort. In fact, according to the Department of Justice study, 64% of all dollars awarded for punitive damages in 1992 were awarded in cases involving financial injury.

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 968 (2007) (internal citations omitted) (emphasis added). This trend is especially problematic in contractual disputes, where defendants generally do not have "fair notice" that their conduct may give rise to any punishment at all, particularly when the defendant's interpretation of the contract is objectively reasonable.

This Court should remind reviewing courts that the purpose of the "reprehensibility" factor is to determine whether the conduct "was *especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed." *Id.* at 590 (Breyer, J., concurring) (emphasis in original). In most contractual disputes, this analysis should support only a modest award, if any at all. *See Safeco Inc. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007) (actions based upon an objectively reasonable interpretation of a statute are neither willful nor reckless); *see also*

A. Mitchell Polinsky, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 939 (1998) (concluding that "courts should be cautious about awarding punitive damages for breach of contract.").

2. "Ratio" – Courts Should Be Reminded to Weigh Reasonableness *And* Proportionality

The second *Gore* factor focuses on the ratio of punitive to compensatory damages. The Petitions raise two related issues with respect to the application of this guidepost.

First, too many courts have lost sight of the forest for the trees. They have become so focused on applying mathematical ratios that they have forgotten that the "ratio" guidepost is intended to prevent excessive awards, not justify them. Petitioner Massey Energy's case is a textbook example.

Before courts launch into considering the ratio between punitive and compensatory awards in a particular case, they need to be admonished to take a step back and ask, "Does this award go beyond the State's interests in punishment and deterrence?" *See Gore*, 517 U.S. at 568. If the award exceeds the amount supported by those interests, either in actual dollar terms *or* by reference to a ratio, then the award must be declared unconstitutional.

Indeed, in *Campbell*, this Court said that "courts must ensure that the measure of punishment is *both reasonable and proportionate* to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. 426. Plainly, courts need to be reminded to consider both reasonableness and proportionality; they cannot rubber stamp large awards

simply because the ratio, standing alone, does not appear offensive.

Second, clearer guidance is needed with respect to the acceptable ratio to be applied in cases such as these involving very substantial compensatory awards. In *Campbell* (2003), the Court said that, "*in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*," repeated its *Haslip, TXO, and Gore* statements that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and also referred to "a long legislative history . . . providing for sanctions for double, treble, or quadruple damages to deter and punish." 538 U.S. at 425 (emphasis added). The Court also explained, "*When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" *Id.* (emphasis added).

Most recently, in *Baker* (2008), the Court, sitting as a common law court, explained that the "real problem" with punitive damages is their "stark unpredictability," 128 S. Ct. at 2625, emphasized that "*a penalty should be reasonably predictable in its severity*," *id.* at 2627, and concluded that "*as long 'as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded . . . will be arbitrary.*" *Id.* at 2629 (emphasis added; citation omitted). The Court then settled on a 1:1 ratio of punitive damages to compensatory damages as a "fair upper limit" in maritime cases. *Id.* at 2633.

This Court should squarely hold that a 1:1 ratio provides the "fair upper limit" in cases like these that involve very large compensatory damages and questionable reprehensibility.

3. Courts Need to be Reminded That They Must Consider Civil or Criminal Penalties For Comparable Conduct

In a pre-*Gore* law review article and *amicus curiae* briefs to the Court, these authors suggested that punitive damages should be considered in light of criminal fines for similar conduct.[3] The third *Gore* factor instructs courts to consider the "civil or criminal penalties that could be imposed for comparable misconduct."

Unfortunately, lower courts have struggled in their attempts to apply the third *Gore* factor. Some courts have faithfully applied all three of the Court's guideposts, but "many courts have selectively applied the criteria in ways that run counter to the letter and spirit of the Court's jurisprudence." Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, But Many Courts Are Failing to Follow The Letter And Spirit of The Law*, 82 OR. L. REV. 33, -- (2003).

In particular, many courts are ignoring, giving "short shrift" to, or misapplying the third *Gore* factor. *See id.*; *see also* Brief of General Dynamics Corp. as

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[3] *See, e.g.*, Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform — State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U.L. REV. 1365, 1380 n.87, 1386-1391 (1993).

Amicus Curiae in Support of Petitioner, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, at 3, *available at* 2000 WL 1793074 (explaining how the "vast majority of appellate courts have ignored or misapplied [*Gore's*] third Guidepost); Mark A. Klugheit, "*Where the Rubber Meets the Road*": *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*. 52 SYRACUSE L. REV. 803, 834 (2002) ("The Third *BMW* factor -- existing sanctions for comparable misconduct -- seems to have been honored by lower courts as much in the breach as in the observance."). "Some have erroneously interpreted the Court's discussion of the third guidepost to preclude any comparison of punitive damages awards with criminal penalties on the ground that civil proceedings lack the protections afforded in criminal prosecutions." Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004).

Courts must be reminded to faithfully apply *Gore* "factor three."

III. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS

This Court has repeatedly emphasized the importance of appellate review as a critical check against arbitrary, excessive, and unpredictable punitive damages awards. *See Williams*, 127 S. Ct. at 1063-64; *Campbell*, 538 U.S. at 418; *Cooper Industries*, 532 U.S. at 426; *Oberg*, 512 U.S. at 420; *Haslip*, 499 U.S. at 20. That safeguard is discretionary and often nonexistent in West Virginia, as the subject Petitions

illustrate. West Virginia is the only state in which there is no right to appellate review of a punitive damages award exceeding $350,000, even if the award is completely lawless.

As we explain below, West Virginia's system (1) violates this Court's due process holdings, (2) is far outside the legal mainstream, and (3) creates a substantial risk that civil defendants will either face excessive punishment in West Virginia or be forced to turn to this Court to uphold due process limits in many instances. This Court should grant certiorari and hold that due process requires at least one meaningful review of a punitive damages award by an appellate court.

In *Haslip*, where this Court upheld a punitive award as consistent with due process, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S. at 20. The Court explained, "By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion," and said that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." 499 U.S. at 20-21. In *TXO*, the plurality found that the fact that the award was unanimously affirmed on appeal gave rise to a "strong presumption of validity." 509 U.S. at 457.

In subsequent cases the Court again emphasized the importance of appellate review to the due process analysis. In *Oberg*, the Court explained that "[j]udicial review of the size of punitive damages has been a safeguard against excessive verdicts for as

long as punitive damages have been awarded." 512 U.S. at 421. The Court held that Oregon's denial of judicial review of the size of punitive damages awards violated due process. *See id.* at 432. *Oberg* has been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004).

In *Cooper*, the Court held that federal appellate court review of punitive damages must be *de novo*. 532 U.S. at 443; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-70 (2004) ("state appellate courts, too, must exercise de novo review over whether punitive damages are excessive.").

More recently, this Court confirmed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (citation omitted). If appellate review of punitive damages must be *de novo* and "[e]xacting," then certainly due process is violated when a state completely denies a defendant of any right to appellate review of a substantial punitive award.

The *Oberg* Court's due process methodology provides additional support for holding that West Virginia's system violates due process. In *Oberg*, the Court looked to modern and traditional procedures as a benchmark. 512 U.S. at 426, 435.

The modern practice in forty-eight states, the District of Columbia, and the federal court system, is to

give punitive damages defendants at least one appeal as of right. West Virginia and its "mother state," Virginia, are the only two states that do not afford such a right. Virginia, however, protects against substantial punishment by capping punitive damages at $350,000, *see* VA. CODE § 8.01-38.1, and the Virginia Supreme Court considers the refusal of a petition for appeal to be "a decision on the merits." *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002). West Virginia, therefore, is the only state which denies a right to appellate review on the merits to defendants facing a substantial punitive damages judgment. Moreover, as Petitioners explain, the right to appellate review finds additional support in the common law. *See, e.g., Oberg*, 512 U.S. at 421.[4]

The need for appellate review in West Virginia is heightened by the State's notorious reputation for treating civil defendants unfairly, particular large out-of-state corporations. West Virginia has the dubious distinction of being named the only statewide "Judicial Hellhole" by ATRA for several years running.[5] A recent survey of in-house legal counsel conducted by the U.S. Chamber of Commerce's Institute

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[4] This Court has said in *dicta* that states are not constitutionally required to provide appellate review of criminal convictions. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983). *Amici* agree with Petitioners that those statements should not prevent appellate review of punitive damages awards as a matter of right. There is a historical distinction to be drawn. In addition, criminal defendants have the benefit of substantial additional safeguards, including a higher burden of proof, maximum sentences, and federal habeas corpus.

[5] *See* American Tort Reform Foundation, *Judicial Hellholes* 11-14 (2007), http://www.atra.org/reports/hellholes/report.pdf.

for Legal Reform ranked West Virginia as having the nation's worst legal climate.[6]

In 2007, West Virginia was home to three of the seven largest punitive awards in the nation, including the two subject Petitions with punitive damages together approaching *$400 million*.[7] In the third case, which involves nearly $200 million in punitive damages, West Virginia's Governor has taken the extraordinary step of asking the West Virginia Supreme Court of Appeals to provide meaningful review of punitive damages awards. *See Amicus Curiae* Br. of Joe Manchin, III, Governor of the State of West Virginia, *E.I. du Pont de Nemours & Co. v. Perrine*, No. 080721 (W.Va. June 24, 2008). Together, these three verdicts – totaling *over a half a billion dollars in punitive damages* - demonstrate the high risk in West Virginia that an excessive verdict resulting from a lack of procedural safeguards may face absolutely no appellate scrutiny unless this Court holds that such review is required.

The practice of West Virginia trial courts to order reverse bifurcation of punitive damages trials – which the West Virginia courts view as "creative, innovative" trial management, *see In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) – adds to the likelihood that civil defendants will be subject to arbitrary and excessive punishment in the State. *See*

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[6] *See* U.S. Chamber of Commerce Institute of Legal Reform, *Lawsuit Climate 2008: Ranking the States*, http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt.

[7] *See* Verdict Search, *Top Verdicts of 2007*, http://www.verdictsearch.com/index.jsp?do=top100.

Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375 (2008).

This Court should clarify that due process requires affording punitive damages defendants a right to at least one meaningful appellate review. If this Court fails to do so, civil defendants in West Virginia punitive damages cases will have no choice other than to continue to turn to this Court for relief.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the subject Petitions for Writs of Certiorari.

Respectfully submitted,

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Nos. 08-217 & 08-218

IN THE

Supreme Court of the United States

MASSEY ENERGY COMPANY, *ET AL.*,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORP., *ET AL.*,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of Appeals of West Virginia and the Circuit Court of Brooke County, West Virginia

BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* further notes that no counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which the Court is asked to review and decide nationally significant issues relating to due process and remedies. *See, e.g.*, *El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999) (relating to jurisdiction and remedies issues).

The NMA has a substantial interest in this case because many of its members have significant interests in the states of West Virginia and Virginia. West Virginia ranks second nationally in the production of coal, with over 161 million short tons pro-

duced in 2007.[2] Virginia's coal production exceeded 29 million short tons in 2007. And West Virginia and Virginia are the only two states in the Nation that do not afford an appeal as of right of punitive damages awards.

SUMMARY OF ARGUMENT

This Court for many years has found it necessary to admonish courts that they must provide "meaningful and adequate" review of punitive damage awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20-21 (1991). The Court has explained, among other things, that a punitive damages award should be "reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15; *see also Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420-421 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring) (noting that "'procedural due process' requires judicial review of punitive damages awards for reasonableness"). But reviewing an award for reasonableness begs the next question: reasonable as to what? As this Court observed just last Term, punitive awards must not only be reasonable in relation to compensatory awards; they must be reasonable in relation to *each other*, and in this respect punitive damages awards demonstrably often are not. *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2625-27 (2008).

This Court does not sit to monitor on a case-by-case basis what it recently described as the "stark unpre-

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[2] A "short ton" is a unit of mass equal to 2,000 pounds; it is distinguished from the metric ton (1,000 kilograms) and the "long ton" (2,240 pounds).

dictability" of such awards. *Exxon*, 128 S. Ct. at 2625. Rather, it grants review where it determines that there is a broad and compelling interest in having the Court decide the issue presented therein. *See* S. Ct. Rule 10.

The federal and state appellate courts, on the other hand, are where errors in the trial process are *supposed* to be corrected. *Cf. Greenlaw* v. *United States*, ___ U.S. ___, 128 S. Ct. 2559, 2571 (2008) (Alito, J., dissenting) (urging the Court to "entrust the decision to initiate error correction to the sound discretion of the courts of appeals"). And where punitive damage awards are concerned, courts of appeals regularly find themselves in an error-correcting role. Punitive damages awards are modified or vacated in a *substantial* percentage of cases. Appellate review of damages awards furthers what this Court identified in *Exxon* as the goal that penalties be "reasonably predictable in [their] severity." 128 S. Ct. at 2627. That goal—predictability of outcomes—is a fundamental tenet of due process. It is achieved when appellate courts rigorously review jury awards. But rigorous appellate inquiry is nowhere to be found in West Virginia, whose unique judicial system couples discretionary appellate review with a notorious tolerance for colossal punitive damages awards. The petitions should be granted.

REASONS FOR GRANTING THE WRIT

APPELLATE REVIEW MATTERS.

A. Appellate Courts Vacate Or Modify Punitive Damages Awards In A Substantial Percentage Of Cases.

It is the purpose of the Due Process Clause to ensure "the fair and orderly administration of the laws." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). One fundamental element of the law's "orderly administration," embedded in countless legal doctrines, is predictability: it is a central goal of the law that individuals and entities be able to understand the legal consequences of their conduct by reference to clear rules and the application of those rules to similar facts. As this Court explained years ago in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980), predictability in the legal system (in that case, notice of what conduct would and would not trigger personal jurisdiction over the person in state court) "allows potential defendants to structure their primary conduct with some minimum assurance" of the legal consequences of their actions. *See also Koon* v. *United States*, 518 U.S. 81, 113 (1996) (noting in the criminal context the need to "reduce unjustified disparities" in sentencing, "and so reach toward the even-handedness and neutrality that are the distinguishing marks of any principled system of justice").

In the same vein, just last Term in *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. at 2625, this Court voiced dismay at what it called the "stark unpredictability of punitive awards." As it ex-

plained, data purporting to show a low "median ratio of punitive to compensatory awards" and empirical evidence that "punitive awards are infrequent" shed no light on the critical question of *consistency* across awards, *i.e.*, "whether the spread between high and low individual awards is acceptable. The available data suggest it is not." *Id.* After citing some of that data, the Court observed that fluctuations in punitive awards

> might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. But anecdotal evidence suggests that nothing of the sort is going on. * * * We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances. [*Id.* at 2625-26.][3]

This demonstrable lack of consistency across punitive damage awards for similar conduct mars the judicial system. Awards wholly out of scale with those approved in similar circumstances cast an "implication of unfairness" on the proceedings, to the

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[3] The Court also pointed to the Alabama Supreme Court's later-reversed decision in *BMW of North America, Inc.* v. *Gore*, in which the state court, confronted with two wildly different punitive damages verdicts (one $0 and one $4 million) in "strikingly similar" circumstances dismissively explained that the gross disparity between the two awards was merely " 'a reflection of the inherent uncertainty of the trial process.' " *Id.* at 2626 (citing and quoting *BMW of N. Am., Inc.* v. *Gore*, 646 So.2d 619, 626 (1994), *rev'd*, 517 U.S. 559 (1996)).

serious detriment of a system "whose commonly held notion of law rests on a sense of fairness in dealing with one another." *Id.* at 2627. Justice Holmes's hypothetical "bad man" and his counterparts all should face penalty schemes that produce "a fair probability of suffering in like degree when they wreak like damage." *Id.*

There are, of course, a few examples from this Court where large punitive damages awards are reduced after merits briefing and argument—the latest being *Exxon* itself. *See id.* at 2634 (vacating $2.5 billion judgment and remanding for court of appeals to remit punitive damages to $500 million, representing a 1:1 ratio of punitive to compensatory damages). *See also State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996).

But as these very few decisions show, this Court's charge is not to sit as a court of error correction; the Court "rarely" grants certiorari "where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances. It accordingly falls to the lower appellate courts—which because they review multiple trial courts' rulings have the necessary vantage point for such work—to impose the "consistency" and "predictability" across damages awards this Court identified as a valued aspect of the judicial system. *See Exxon*, 128 S. Ct. at 2626 & n.17; *Honda Motor Co.*, 512 U.S. at 421 ("Judicial review of the size of punitive damages awards has been a safeguard

against excessive verdicts for as long as punitive damages has been awarded") (citing cases dating back to 1763); *see also Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (noting that "legal rules * * * acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.")

The "safeguard against excessive verdicts," *Honda Motor Co.*, 512 U.S. at 421, is often invoked and rigorously enforced at the appellate level—at least, by courts of appeals in 48 states and the District of Columbia. This Court observed as much in *Honda*, noting that "the most exhaustive study of punitive damages establishes that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." *Id.* at 433 n.11 (citing Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 57 (1992)).[4] As

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[4] *See also, e.g.*, William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Regulation, Sept.–Oct. 1986, at 33 (noting that in a 1986 sample of federal product-liability cases, federal appellate courts reversed or remitted punitive awards in 7 of 10 cases); Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 Just. Sys. J. 349, 353 (1986) (studying 198 high-dollar awards and finding that the jury award remained unmodified in only slightly more than one-quarter of cases); Mark Peterson, Syam Sarma & Michael Shanley, Inst. for Civ. Justice, R–3311–ICJ, *Punitive Damages: Empirical Findings* 30 (1987) (reporting findings that "most large punitive damages awards were reduced by post-trial activity"— based upon a survey of attorneys of record in 129 trials conducted between 1979 and 1983).

the same commentator the *Honda* Court cited approvingly noted several years later, in the years following *BMW*, the federal courts of appeals vacated or remitted punitive damages awards in eight out of eleven cases reviewed. *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 1, 14 (1998).[5]

When the courts of appeals take up and (often) reverse, reduce, or modify punitive damages awards, they naturally look to this Court for guidance on the parameters to apply to test the awards' reasonableness.[6] But when it comes to putting those constitu-

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[5] More recent studies similarly conclude that jury punitive damages awards are more often than not reduced by trial or appellate courts on post-verdict review. *See, e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Punitive Damage Awards in Large Counties*, 2001 (March 2005) (noting that over half of punitive damage awards were modified after verdict); Michael L. Rustad, *The Closing of Punitive Damages' Iron Case*, 38 Loy. L.A. L. Rev. 1297, 1329-34 (2005) (examining state-court review of the excessiveness of punitive damage awards); *see also* Tamara Loomis, *Punitive Damages; Practical Impact of High Court Decision Is Disputed*, 225 N.Y.L.J. 5 (2001) (reporting that of 29 high-dollar punitive damages verdicts in 1994, ten were reversed and another ten were severely reduced).

[6] Courts of appeals also regularly reverse outright punitive damages awards because of fundamental legal, evidentiary, or instructional deficiencies in the trial process. *See, e.g., White* v. *Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (reversing and remanding for new trial on punitive damages because of instructional error); *Exxon Mobil Corp.* v. *Alabama Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093, 1117-18 (Ala. 2007) (reversing $3.5 billion punitive damages award on the ground that no fraud had been proven); *Ciba-Geigy, Inc.* v. *Murphree*, 653 So.2d 857, 867 (Miss. 1994) (reversing $500,000 punitive damages award on ground that "[t]here is nothing alleged that could lead to" the imposition of punitive damages). The appellate courts' function thus is not just to ensure regularity across

tional parameters to practice and determining whether a particular award is "reasonable" in the circumstances, appellate courts look to other cases presenting similar circumstances in order to further predictability and consistency across outcomes. *See Exxon*, 128 S. Ct. at 2625-26.

In *JCB, Inc.* v. *Union Planters Bank, NA*, ___ F.3d ___, 2008 WL 3897384 (8th Cir. Aug. 26, 2008), for example, a jury awarded over a million dollars in punitive damages on a single trespass claim resulting from a repossession, and the district court refused to modify or remit the award. Examining, among other things, other cases comparable to the claim on review, the court of appeals concluded that the punitive award on the trespass claim was "beyond what due process will permit." *Id.*, 2008 WL 3897384, at *10. As it explained, the highest punitive damages award it could find "in a comparable Missouri case" was substantially lower than the jury's million-dollar award, and the award in the comparator case was rendered on claims that covered both trespass and conversion. *Id.* (citing *Perkins* v. *Dean Mach. Co.*, 211 S.W.3d 148 (Mo. Ct. App. 2007)). The Eighth Circuit ultimately cut back the jury's punitive damages award to one-tenth the original amount. *Id.*

In *Bridgeport Music, Inc.* v. *Justin Combs Publishing*, 507 F.3d 470 (6th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3630 (U.S. May 19, 2008) (No. 07-1438), a jury had found the defendants liable for copyright infringement after they released a song

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verdicts; it is to ensure that the verdicts were justly rendered in the first place.

containing an unlicensed sample. The jury awarded a total of $3.5 million dollars in punitive damages, and the district court declined to modify or remit the punitives award. *Id.* at 477-478. On appeal, the Sixth Circuit concluded that the punitive award was unconstitutionally excessive: defendants' copyright violations were "not so reprehensible as to justify" an award of that magnitude, the plaintiff was not financially vulnerable, and there was no evidence that the infringing action was part of a pattern of misconduct.[7] *Id.* at 487-488.

The court reached that conclusion by reference to, among other things, earlier decisions of its own and from other circuits. The court of appeals explained that it previously had held in a case also presenting only one "reprehensibility factor[ ]" that a 2:1 or 1:1 ratio of punitives-to-compensatory damages was permissible. *Id.* (citing *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 601, 613-614 (6th Cir. 2006)). And the court had held in another appeal that a 1:1 ratio of punitives to compensatories was appropriate where only one "reprehensibility factor" was present. *Id.* at 488 (citing *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007)).

The court of appeals also looked outside its own jurisdiction to the Eighth Circuit, which similarly had concluded that a 1:1 ratio "was appropriate where the compensatory damages award was large and the defendant's conduct was more reprehensible

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[7] The court of appeals also concluded that the jury mistakenly had included compounded prejudgment interest in its compensatory damages award—a mistake the district court also had failed to correct. *Id.* at 484-485.

than in this case." *Id.* (citing *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 792-793 (8th Cir. 2004)).

The Sixth Circuit engaged in a similar inquiry when it came time to assess the ratio between compensatory and punitive damages in the case: after acknowledging this Court's instruction on the issue, *id.* (citing, inter alia, *State Farm*, 538 U.S. at 425), the court of appeals again returned to its prior precedents and determined that the ratio of awards in the case was intolerably high. *Id.* at 488-489 (citing *Bach*, 486 F.3d at 156-157, and *Pollard* v. *E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 666-668 (6th Cir. 2005)). *See also, e.g.*, *DiSorbo* v. *Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) (reducing punitive damages award in police-misconduct case after "assess[ing] such awards in other police misconduct cases"); *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568, 577 (8th Cir. 1997) (reducing $5,000,000 award to $350,000 after "considering awards in similar cases"); *Lee* v. *Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (remitting $200,000 punitives award to $75,000 after "examin[ing] punitive damage awards in similar cases"); *Continental Trend Res., Inc.* v. *Oxy USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (examining awards from other states to conclude that defendant was sufficiently on notice of the possibility of a large punitive award, but remitting the jury's $30,000,000 award to $6 million).

State appellate decisions are the same. In *Burlington Northern Railroad Co.* v. *Whitt*, 575 So.2d 1011 (Ala. 1990), for example, a railroad challenged as unconstitutionally excessive a $15 million punitive damages jury award that the trial court on post-trial motions had refused to reduce. The Alabama Su-

preme Court remitted the award to $5 million after "having compared verdicts in similar cases that have come to this Court." *Id.* at 1024. The court observed that it was the "only appellate court with the ability to assure some degree of uniformity in the area of punitive awards," and it thus fell to that court to "determine whether the award is excessive when compared to awards in similar cases." *Id.*

The Supreme Court of Illinois embraced the same approach in *International Union of Operating Engineers, Local 150* v. *Lowe Excavating Co.*, 870 N.E.2d 303, 322 (Ill. 2006), when it took up a defendant's appeal of a $325,000 punitive damages award in a union lawsuit. "In our estimation," the court explained, "the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases." The plaintiffs in that case had cited several earlier decisions in support of the substantial punitive damages verdict there; but the Supreme Court found those cases distinguishable in kind and degree. *Id.* at 322. After identifying other, more factually similar cases that "provide[d] some guidance on the issue," the court concluded that the $325,000 award was far in excess of that awarded in similar cases, and that a $50,000 award was reasonable. *Id.* at 323-324. *See also Gehrett* v. *Chrysler Corp.*, 882 N.E.2d 1102, 1120-22 (Ill. App. Ct. 2008) (thoroughly reviewing cases from Illinois, the Seventh Circuit, and other courts of appeals that previously had addressed punitive damages in similar factual contexts and ultimately directing a substantial remittitur of punitives).

JCB, *Bridgeport*, *Burlington Northern*, *Lowe*, and other appellate decisions like them demonstrate the

utility—indeed, the necessity—of appellate review of punitive damage awards to maintain some degree of consistency and predictability across the judicial system. Federal and state appellate courts take direction from this Court on the constitutional boundaries of a punitive damages award. They apply those teachings—and ensure some degree of consistency among awards in similar cases—by seeking guidance in turn from other cases in their own or other appellate courts presenting similar fact patterns. A jury in an individual case, of course, is not privy to that systemwide knowledge. And busy trial courts reviewing jury verdicts may or may not be fully apprised of the range of verdicts upheld (or not) in similar circumstances in their home or a sister state. It falls to the appellate courts in their oversight role to ensure that the orderly administration of justice produces reasonably predictable outcomes in high-dollar cases. And in West Virginia, that oversight is for all practical purposes nonexistent.

B. The Supreme Court Of West Virginia's System Of Discretionary Review Fails To Provide Sufficient Meaningful Appellate Review Of Punitive Damages Awards.

The Supreme Court of West Virginia's "appellate jurisdiction is entirely discretionary. It may either grant or refuse review of any case." Supreme Court of West Virginia website, *available at* http://www.state.wv.us/wvsca/Supreme.htm (last accessed Sept. 19, 2008). Review is refused far more often than it is granted; the most recent statistics available from that court show that its overall petition grant rate is eleven percent. *See* West Virginia Supreme Court of

Appeals 2006 Annual Report, *available at* http://www.state.wv.us/wvsca/2006 Stats.pdf.

Despite the relative stinginess of its grants, the Supreme Court's role includes that of being a court of error: its rules direct petitioning parties to enumerate the "assignments of error relied upon on appeal," W. Va. S. Ct. R. 3(c)(4), and further review will be denied if the Court in its limited inquiry at the petition stage concludes that the trial court's decision was "plainly right." *Id.* R. 7(a). But the West Virginia Supreme Court's eleven-percent grant rate pales in comparison to the proven *error* rate of punitive damages awards; study after study has demonstrated that courts reviewing punitive damages awards modify or overturn those awards over half the time. *See supra* at 8-9.

Unless West Virginia's trial-court decisions are orders of magnitude more accurate than those rendered by its sister-state courts, therefore, errors are left unremedied at the West Virginia Supreme Court. The result: some of the largest punitive damages awards in the Nation are left unexamined by any appellate court for their reasonableness in relation to other awards rendered in like circumstances. This is not due process; it is a lottery. The Alabama Supreme Court in *Gore* chalked up gross disparities among verdicts in that state to the inherent "uncertainty" of the trial system—an assertion this Court made short work of on merits review. This Court similarly should grant review of these petitions, conclude that due process requires more than West Virginia gives, and reverse.

CONCLUSION

For the foregoing reasons, and those in the petitions, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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